APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-40416

MONICA CASTRO, For Herself and
as Next Friend of R.M.G.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

June 2, 2010, Filed

DAVIS, SMITH, WIENER, GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, and HAYNES, Circuit Judges. HAROLD R. DeMOSS, JR., Circuit Judge, dissenting. CARL E. STEWART, Circuit Judge, joined by HAROLD R. DeMOSS, JR., Circuit Judge, dissenting. DENNIS, Circuit Judge, concurring in the judgment in part and dissenting in part.

OPINION

PER CURIAM:

I.

Monica Castro, for herself and as next friend of R.M.G., her minor child (jointly "Castro"), sued the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, alleging, *inter alia*,

that the government's negligence caused the wrongful deportation of R.M.G., a U.S. citizen. The government moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) or, alternatively, for summary judgment pursuant to Federal Rule of Civil Procedure 56. The district court held that the government is protected from suit by 28 U.S.C. § 2680(a), the discretionary function exception of the FTCA. In a comprehensive and well-reasoned opinion, the court entered a final judgment dismissing Castro's tort claims for lack of subject matter jurisdiction and dismissing her constitutional and injunctive claims as moot. *Castro v. United States,* 2007 U.S. Dist. LEXIS 9440 (S.D. Tex. Feb. 9, 2007) (Jack, J.).

A divided panel of this court reversed and remanded. *Castro v. United States*, 560 F.3d 381 (5th Cir. 2009). The court granted rehearing en banc, thus vacating the panel opinion. *Castro v. United States*, 581 F.3d 275 (5th Cir. 2009). Concluding that the discretionary function exception applies, we affirm the judgment of the district court.

II.

The pertinent facts are not in dispute and are cogently set forth in the district court's and panel's opinions. Although, like the district court, we "[do] not condone the Border Patrol's actions or the choices it made," *Castro*, 2007 U.S. Dist. LEXIS 9440, at *27, the district court was correct in concluding that, because plaintiff's tort claims are barred by the discretionary function exception to the FTCA, the court was without subject matter jurisdiction, and the government's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) should be granted.

Correctly noting that the burden on a rule 12(b)(1) motion is on the party asserting jurisdiction – here, Castro – the court, in a comprehensive and convincing order, carefully explained that the two prongs of *United States v. Gaubert*, 499 U.S. 315, 322-23, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), are satisfied:

> . . . [T]he Border Patrol Agents' decision to let R.M.G. accompany her father back to Mexico was the product of a judgment or choice, and the Border Patrol Agents' conduct in the situation was not mandated by any statute, regulation or policy . . . . [T]he Border Patrol Agents' decision was unequivocally subject to policy analysis, as it involved the use of government resources and necessarily involved a decision as to what the Border Patrol should do with a United States citizen child in the unique circumstances presented by such a case.

Castro, 2007 U.S. Dist. LEXIS 9440, at *22-*23, *33.

We affirm, essentially for the reasons given by the district court, the dismissal of the FTCA claims for want of jurisdiction. We also agree with the district court's explanation that the constitutional claims are moot, as is the claim for injunctive relief.

AFFIRMED.

CONCUR BY: DENNIS (In Part)

DISSENT BY: HAROLD R. DeMOSS; CARL E. STEWART; DENNIS (In Part)

DISSENT

HAROLD R. DeMOSS, JR., Circuit Judge, dissenting:

I concur in Judge Stewart's astute dissent. If the Border Patrol agents exceeded the scope of their authority, the discretionary function exception would not apply and Monica Castro's tort claims would not be barred by sovereign immunity. But, even if the Border Patrol agents acted within the scope of their authority and the discretionary function exception applied, Castro's claims for false imprisonment, abuse of process, and assault would not be barred by sovereign immunity. The law enforcement proviso waives sovereign immunity for those claims.

"Generally, sovereign immunity bars suits against the Government." *Ashford v. United States*, 511 F.3d 501, 504 (5th Cir. 2007). The Federal Tort Claims Act waives "the Government's sovereign immunity for torts committed by its employees in circumstances where, if the Government were a private person, the Government would be liable under state law." *Martin v. Halliburton*, 601 F.3d 381, 390-91 (5th Cir. 2010) (citations omitted); *see* 28 U.S.C. § 1346(b)(1). This general waiver of sovereign immunity is circumscribed by a list of exceptions in 28 U.S.C. § 2680. *Ashford*, 511 F.3d at 504. Pertinent to this appeal are the discretionary function and intentional tort exceptions.

Under § 2680 sovereign immunity is not waived when the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty" (the discretionary

function exception) or when the claim arises "out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" (the intentional tort exception). 28 U.S.C. § 2680 (a) & (h). The law enforcement proviso in § 2680(h), however, provides an exception to these exceptions. *See Nguyen v. United States*, 556 F.3d 1244, 1255-56 (11th Cir. 2009); *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987); *see also* § 2680(h). The proviso waives sovereign immunity "with regard to acts or omissions of investigative or law enforcement officers" for "any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." § 2680(h). If the law enforcement proviso applies, sovereign immunity is waived and the discretionary function and intentional tort exceptions will not bar a plaintiff's claims for relief. *Nguyen*, 556 F.3d at 1256-57 (effecting "the plain meaning and clear purpose of the statutory language by concluding that sovereign immunity does not bar a claim that falls within the proviso to subsection(h), regardless of whether the acts giving rise to it involve a discretionary function"); *see Sutton*, 819 F.2d at 1297 (concluding that "the discretionary function exception cannot be an absolute bar which one must clear to proceed under [the] § 2680(h)" law enforcement proviso).

Monica Castro alleged the following torts against the United States: negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault. The district court correctly found that the law enforcement proviso applies to Castro's claims for false imprisonment, abuse of process, and

assault. Neither party contests that finding. Because the law enforcement proviso applies, sovereign immunity is waived. The court has subject matter jurisdiction over these claims and the district court's holding to the contrary is in error.

For these reasons and for the reasons stated by Judge Stewart, I dissent.

CARL E. STEWART, Circuit Judge, joined by HAROLD R. DeMOSS, JR., Circuit Judge, dissenting:

With undisputed knowledge of the United States citizenship of baby girl R.M.G., Border Patrol agents in Lubbock, Texas, took R.M.G. into custody with her undocumented father, Omar Gallardo, when he was detained for removal. Monica Castro, R.M.G.'s United States citizen mother, pleaded with the Border Patrol to turn over her daughter and allow her to remain in the United States. Castro also frantically sought to secure a temporary custody order in a matter of hours. But on the very same day that R.M.G. and Gallardo were detained, and although Gallardo did not have a custody order in his favor, the Border Patrol deported R.M.G. and Gallardo to Mexico. Castro could not locate her daughter for the next three years.

The majority acknowledges the novel facts of this case, but minimizes their importance to the legal inquiry. The majority further erroneously applies the principles of Rule 12(b) according to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and disregards the Supreme Court's instruction to "narrowly construe[ ] exceptions to waivers of sovereign immunity . . . in the context of the sweeping language of the [FTCA]." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006)

(internal citations and quotation marks omitted). I therefore respectfully dissent.

I.

On behalf of herself and R.M.G., Castro brought state law claims of negligence, intentional infliction of emotional distress, and false imprisonment against the United States under the Federal Tort Claims Act ("FTCA"). Castro plausibly alleged that the Border Patrol exceeded the scope of its authority under the Immigration and Nationality Act of 1953 ("INA"), 8 U.S.C. § 1101 *et seq.*, and the Fourth and Fifth Amendments. The discretionary function exception to the FTCA does not shelter against liability for unauthorized actions by government agents, yet the majority nonetheless applies the discretionary function exception without any inquiry into whether the Border Patrol agents acted in excess of their authority. In my view, the order granting the Government's Rule 12(b)(1) motion to dismiss based on the discretionary function exception should be vacated and the case remanded for an evaluation of whether the Border Patrol acted outside of its authority.

II.

The FTCA provides consent for suit against the United States "for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). One exception to the FTCA's consent-to-be-sued is the discretionary function exception, 28 U.S.C. § 2680(a),

the purpose of which is "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and public policy. . . ." *United States v. Gaubert,* 499 U.S. 315, 323 (1991). The discretionary function exception applies when: (1) the challenged government action involves "an element of judgment or choice" by a government agent and (2) the complained-of choice is "the kind that the discretionary function exception was designed to shield." *Id.* at 322-23 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

The discretionary function exception does not protect the unauthorized acts of government agents. *See Berkovitz*, 486 U.S. at 539 ("The discretionary function exception applies only to conduct that involves the *permissible* exercise of policy judgment.") (emphasis added); *Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994) ("Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its agents who act within the scope of their employment."). "[C]ourts have read the Supreme Court's discretionary function cases as denying protection to actions that are unauthorized because they are unconstitutional, proscribed by statute, or exceed the scope of an official's authority." *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003) (internal citations omitted). This safeguard inherent in the discretionary function exception has been recognized by seven other circuits,[1] in addition to this

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[1] *See Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009) ("It is elementary that the discretionary function exception does not immunize the government from liability for actions proscribed

circuit. *See Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) (concluding that action by a government agent "does not fall within the discretionary function exception of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution."). Despite the overwhelming weight of authority and our own precedent, the majority entirely ignores the principle that the discretionary function exception does not encompass unauthorized actions.

If the Border Patrol agents acted outside their scope of authority by violating R.M.G.'s constitutional

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by federal statute or regulation. Nor does it shield conduct that transgresses the Constitution.") (internal citations omitted); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) ("We must also conclude that the FBI's alleged surveillance activities fall outside the FTCA's discretionary-function exception because [plaintiff] alleged they were conducted in violation of his First and Fourth Amendment rights."); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) (noting that the starting point of the discretionary function exception analysis is that "federal officials do not possess discretion to violate constitutional rights or federal statutes") (quoting *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988)); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) ("governmental conduct cannot be discretionary if it violates a legal mandate"); *Prisco v. Talty*, 993 F.2d 21, 26 n.14 (3d Cir. 1993) (concluding that the discretionary function exception was inapplicable to an FTCA claim based on conduct that violated plaintiff's constitutional rights); *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196, 255 U.S. App. D.C. 162 (D.C. Cir. 1986) ("An employee of the government acting beyond his authority is not exercising the sort of discretion the discretionary function exception was enacted to protect."); *Birnbaum v. United States*, 588 F.2d 319, 329 (2d Cir. 1978) ("An act that is clearly outside the authority delegated cannot be considered as an abuse of discretion.") (internal quotation marks and citations omitted).

rights, then those constitutional transgressions foreclose the protection of the discretionary function exception. A Border Patrol agent's authority is also limited by statutory mandates, therefore any actions of the Border Patrol agents in contravention of specific provisions of the INA or other statutes preclude the application of the discretionary function exception. *See Gaubert*, 499 U.S. at 324 ("If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy."). The majority errs by concluding that the discretionary function exception deprived the district court of jurisdiction and dismissing Castro's claims without an evaluation of whether the actions of the Border Patrol agents exceeded the scope of their authority.

III.

A.

"Whether the district court lacked jurisdiction to consider the government's conduct in this case is a question of law, subject to de novo review by this Court." *Buchanan v. United States*, 915 F.2d 969, 970 (5th Cir. 1990) (internal citations omitted); *see also Limone*, 579 F.3d at 101 ("We afford de novo review to a district court's determination that the discretionary function exception does or does not apply."). To survive a motion to dismiss, a complaint need only contain sufficient factual matter to "state a claim for relief that is plausible on its face." *Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127, 133 (5th Cir. 2009) (citing *Twombly*, 550 U.S. at 544); *see also Iqbal*, 129 S. Ct. at 1950 (reiterating the *Twombly* holding that "a complaint that states a plausible claim

for relief survives a motion to dismiss."). All factual allegations contained in the complaint must be accepted as true. *Iqbal*, 129 S. Ct. at 1949.

B.

The majority acknowledges that we have before us a Rule 12(b)(1) dismissal, but it erroneously concludes that Castro has not met her burden under *Twombly* and *Iqbal*. To the contrary, based on the allegations contained in Castro's complaint, the Border Patrol agents' actions in detaining and deporting R.M.G. implicate both statutory and constitutional concerns. The facts included in the complaint – in particular the undisputed fact that the Border Patrol agents knew R.M.G's citizenship status and did not doubt that she was a United States citizen – support a plausible claim that the Border Patrol agents exceeded the scope of their statutory and constitutional authority and their actions were therefore non-discretionary.

Castro's complaint alleged a plausible violation of specific constitutional mandates: the Fourth Amendment right to be free from unreasonable seizure and the Fifth Amendment right to due process. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (explaining that the Fourth Amendment "forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens"); *Hernandez v. Cremer*, 913 F.2d 230, 237 (5th Cir. 1990) (observing that "the right of a United States citizen to enter the country is a right which the fundamental law has conferred upon him" and "is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment.") (internal

citations and quotation marks omitted). In her complaint, Castro alleged the following:

> Defendant United States' detention of Plaintiff R.M.G. without due process violated her Fourth Amendment constitutional interest in remaining free from bodily seizure. . . . Detention of Plaintiff R.M.G. was not due to an act of wrongdoing that warranted detention nor was detention based on an emergency. The United States did not and cannot show that seizure of the minor child was necessary to protect Plaintiff R.M.G.'s health, safety and welfare; indeed, Defendant United States placed R.M.G. in imminent danger by deporting her with a man it knew was wanted in connection with a homicide.
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> . . . Plaintiff Castro made a claim of citizenship to Defendant United States on behalf of her minor child, Plaintiff R.M.G. Despite that claim, and despite Defendant's recognition of Plaintiff R.M.G.'s status as a U.S. citizen, Defendant United States intentionally, maliciously, and recklessly violated Plaintiffs' right to procedural due process guaranteed by the Fifth Amendment.
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> . . . Defendant United States willfully detained R.M.G. without her consent or the consent of her U.S. citizen parent, and the detention was without legal authority or justification. . . . From the moment Defendant United States knew or should have known that R.M.G. was a U.S. citizen and that a U.S. citizen parent was present to take possession

> of her and did not release her, Defendant United States had no legal authority or justification to continue its detention of the child.

Castro's complaint additionally alleged that the Border Patrol agents acted outside of their statutory grant of authority under the INA, averring that "[n]o section of [the INA] provides authority for the United States to detain or remove a U.S. citizen." The Border Patrol is an agency of the Department of Homeland Security, and subject to the INA. *See* 8 C.F.R. § 1.1. The INA's scope is limited to regulating the entry of aliens, as well as their detention, removal, and naturalization. *See, e.g.*, 8 U.S.C. §§ 1101(a)(23), 1103(a)(1), 1231(a). Within this statutory grant of authority, Border Patrol agents have discretion in making determinations in matters such as the detention or removal of aliens illegally present in the United States. *See, e.g.*, 8 U.S.C. § 1226; 8 C.F.R. §§ 236.1-236.7; *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (explaining the broad INS discretion "in determining who, among a class of eligible aliens, may be granted relief" from removal). No statute grants Border Patrol agents the power to deport United States citizens, however, and the power of Border Patrol agents to detain United States citizens is quite limited. *See* 8 U.S.C. § 1357(a)(5). Nor do Border Patrol agents have statutory authority to make child custody decisions. *Johns v. Dep't of Justice*, 653 F.2d 884, 894 n.26 (5th Cir. 1981) ("Federal immigration authorities lack authority to determine custody of a child or to enforce the custodial rights of others.").

Despite the Border Patrol agents' conceded knowledge of R.M.G.'s citizenship and Castro's

plausible allegations of constitutional and statutory violations, the district court opinion – relied upon by the majority – failed to address whether the Border Patrol agents exceeded their scope of authority. This crucial omission in the district court's Rule 12(b)(1) analysis allows any actions taken by the Border Patrol agents in excess of their authority to nonetheless benefit from the protection of the discretionary function exception. The majority opinion therefore effectively bestows immunity from FTCA liability upon even the most egregious constitutional and statutory violations by government agents, which may reach far beyond their actual authority. This outcome contravenes the fundamental purpose of the FTCA; such an "unduly generous interpretation [ ] of the exception[ ] run[s] the risk of defeating the central purpose of the statute, which waives the Government's immunity from suit in sweeping language." *Dolan*, 546 U.S. at 492 (internal citations and quotation marks omitted).

IV.

The majority opinion weakens a critical, inherent safeguard of the discretionary function exception and neglects Castro's patently plausible allegations of unauthorized actions by the Border Patrol agents in addressing the 12(b)(1) dismissal. I therefore respectfully dissent from the holding of the court. I would vacate the order of the district court and remand for a ruling on whether the Border Patrol agents acted within the scope of their authority.

DENNIS, Circuit Judge, concurring in the judgment in part and dissenting in part.

I agree with the dissents of Judges DeMoss and Stewart concerning the scope of the federal government's waiver of sovereign immunity under the Federal Tort Claims Act, the law enforcement proviso, and the discretionary function exception. However, I partially disagree with them regarding the legal significance of the underlying facts in this case. Therefore, I concur in the result as to the majority's affirmance of the dismissal of most of the plaintiffs' claims, but I dissent as to the claims for abuse of process and assault, which should be remanded to the district court for further proceedings.

First, I agree with Judge DeMoss's dissent that the federal courts have subject matter jurisdiction over the plaintiffs' claims for abuse of process, assault, and false imprisonment, because the federal government has waived its sovereign immunity as to those claims through the FTCA's law enforcement proviso, 28 U.S.C. § 2680(h).[1] *See Nguyen v. United States*, 556 F.3d 1244, 1255-56 (11th Cir. 2009). The district court therefore erred by dismissing these claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

It is not clear to me whether the plaintiffs' claims for abuse of process and assault can survive a Rule 12(b)(6) motion to dismiss. The district court did not decide whether these claims are viable because it

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[1] "[W]ith regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of [the FTCA] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. § 2680(h).

erroneously dismissed the claims for lack of subject matter jurisdiction under Rule 12(b)(1). I would remand those claims to be resolved in the first instance by the district court.

However, with respect to false imprisonment, the plaintiffs have clearly failed to state a claim on which relief can be granted. The elements of false imprisonment under Texas law are "(1) willful detention; (2) without consent; and (3) without authority of law." *Bossin v. Towber*, 894 S.W.2d 25, 29 (Tex. App. 1994) (citing *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985)). When Omar Gallardo, the father, was arrested, R.M.G., the baby girl, was with him. Gallardo wanted to keep his daughter with him while he was being detained (for less than a day) and deported, and the Border Patrol acquiesced. R.M.G. was a baby and therefore lacked the ability to consent independently, but her father could and did consent on her behalf to her remaining with him. Because R.M.G.'s presence in the Border Patrol station was not without consent, it did not amount to false imprisonment. The false imprisonment claim should therefore be dismissed for failure to state a claim on which relief can be granted, under Rule 12(b)(6).

As to the plaintiffs' remaining claims, which do not fall within the law enforcement proviso, I agree with the legal framework set forth in Part II of Judge Stewart's dissent. As Judge Stewart explains, the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a),[2] does not encompass actions by

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[2] Section 2680(a) excludes from the FTCA "[a]ny claim . . . based upon the exercise or performance or the failure to exercise

government agents that are "unconstitutional, proscribed by statute, or exceed the scope of an official's authority." *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003); *see also Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) ("[W]e have not hesitated to conclude that [an] action does not fall within the discretionary function [exception] of § 2680(a) when governmental agents exceed the scope of their authority as designated by statute or the Constitution."). I therefore agree with Judge Stewart that the district court erred in its reasoning by failing to consider whether the Border Patrol agents' actions violated any statutory or constitutional requirements before it decided that the plaintiffs' claims were barred by the discretionary function exception.

Nevertheless, I believe that the plaintiffs' claims – except for those covered by the law enforcement proviso, as discussed above – must be dismissed for lack of subject matter jurisdiction because they are barred by the FTCA's discretionary function exception. The facts as alleged by the plaintiffs do not disclose any constitutional or statutory violations that would make the discretionary function exception inapplicable. Again, Gallardo had his daughter, R.M.G., with him when he was arrested. By permitting Gallardo to keep R.M.G. with him, the Border Patrol agents did not improperly make a custody determination; rather, they left the status quo in place

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or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." Such claims are excluded from the FTCA's waiver of sovereign immunity, and the federal courts therefore lack subject matter jurisdiction over them.

and refrained from making a custody determination, in that they declined to take R.M.G. away from Gallardo against his will. The Border Patrol agents cannot be meaningfully said to have "detained" or "deported" R.M.G., because it was Gallardo, and not the Border Patrol, who decided that the baby should go with him to Mexico. Monica Castro, R.M.G.'s mother, disagreed with Gallardo's decision and wanted the Border Patrol to transfer the baby to her, but she lacked a court order or any other source of legal authority requiring the Border Patrol to take such action. The Border Patrol, by accepting Gallardo's decision to keep R.M.G. with him, did not violate any constitutional or statutory requirement that the plaintiffs have identified.

Because there was no constitutional or statutory violation, the Border Patrol's alleged actions fall within the FTCA's discretionary function exception, and the federal courts therefore lack jurisdiction over the plaintiffs' claims, except for those that are covered by the law enforcement proviso as discussed above. Accordingly, I concur in the judgment except as to the claims for abuse of process and assault. I would remand those two claims to the district court to allow it to decide in the first instance whether they should be dismissed under Rule 12(b)(6).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-40416

MONICA CASTRO, For Herself and
as Next Friend of R.M.G.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

February 20, 2009, Filed

JUDGES: Before SMITH, DeMOSS, and STEWART, Circuit Judges. JERRY E. SMITH, Circuit Judge, dissenting.

OPINION BY: CARL E. STEWART

OPINION

CARL E. STEWART, Circuit Judge:

Plaintiffs-Appellants Monica Castro for herself and as next friend of R.M.G., a minor child (collectively "Castro"), brought suit against the United States of America ("the Government") under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.* Castro alleged, *inter alia,* that the Government's negligence caused the wrongful deportation of R.M.G., a U.S.

citizen. The Government filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) or, alternatively, for summary judgment pursuant to Rule 56. The district court held that the Government is protected from suit due to 28 U.S.C. § 2680(a), the discretionary function exception of the FTCA. Subsequently, the district court entered a final judgment dismissing Castro's tort claims for lack of subject matter jurisdiction and dismissing her constitutional claims as moot. Castro timely appealed.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent facts in this case are not in dispute. Castro, a United States citizen, moved with her parents from Corpus Christi, Texas to Lubbock, Texas when she was approximately fifteen years old. Around that time, Castro met Omar Gallardo, an illegal alien and Mexican national. When Castro was sixteen, she and Gallardo moved together into a trailer near the trailer that Castro's parents rented. On December 4, 2002, Castro gave birth to her and Gallardo's daughter, R.M.G. R.M.G., who was born at the University Medical Center in Lubbock, is a citizen of the United States. Castro was seventeen at the time of R.M.G.'s birth.

Castro and Gallardo had a history of arguing with each other, and Castro contends that Gallardo abused her during the course of their relationship, although she informed neither her parents nor law enforcement authorities of this abuse. Castro maintained that Gallardo was a good father to R.M.G., and that he never abused their daughter.

On November 28, 2003, Castro and Gallardo got into an argument, and as a result, Castro called and

asked her grandparents to come and pick her up. They came the following day, and Castro left the trailer; R.M.G. remained with Gallardo. Immediately thereafter, Castro commenced efforts to recover R.M.G. from Gallardo. Specifically, she contacted the Lubbock County Sheriff's Department, Texas Child Protective Services ("CPS"), and the Lubbock Police Department. The agencies told her that since she was married to Gallardo pursuant to a common-law marriage,[1] and because Gallardo was the child's father, Gallardo had as much right to R.M.G. as she did. Further, Castro was told that her issues with Gallardo constituted a civil dispute, and that she would have to hire a private attorney to seek a custody order. CPS did tell Castro that she could fill out an application to start the process for obtaining assistance from CPS, but that the process would take one to two days. Castro did not fill out the application because she said she did not want to wait one to two days.

On December 1, 2003, Castro, along with her aunt, Sophia Rodriguez, went to the Lubbock Border Patrol station to report that Gallardo was an illegal alien. They spoke with Border Patrol Agent Manuel Sanchez, and they told Sanchez that while Gallardo currently had R.M.G., Castro wanted to recover R.M.G. from

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[1] There is a dispute about whether Castro and Gallardo had a legally-established common-law marriage at the time of R.M.G.'s birth. Before the district court, Castro argues that she could not have agreed to a common-law marriage until her eighteenth birthday, which was April 30, 2003. This issue was not resolved by the district court. However, there is no dispute that Gallardo is R.M.G.'s biological father; accordingly, we need not resolve whether there was a common-law marriage.

him.[2] Agent Sanchez informed Castro that she needed to get a court order for temporary custody of R.M.G. However, Agent Sanchez said that if Castro was present when Border Patrol apprehended Gallardo and certain of his relatives, who were also illegal aliens, Border Patrol would leave R.M.G. with Castro, since they both were U.S. citizens. However, Castro did not wish to be present when Border Patrol went to the trailer because she was afraid of what Gallardo and his family would do to her. Accordingly, on the morning of December 3, 2003, Castro was not present when Border Patrol Agents arrived at the trailer Castro shared with Gallardo; rather, Castro watched the events unfold from her relatives' trailer across the street.

Border Patrol took Gallardo, three of his brothers, and his cousin to the Lubbock Border Patrol station. Since Gallardo had R.M.G. with him, R.M.G. was also taken to the station. Gallardo, R.M.G., and Gallardo's relatives were all placed in a holding cell at the station.

Shortly thereafter, Castro arrived at the station and requested that her daughter be returned to her. However, Gallardo informed the Border Patrol Agents that Castro had walked out on him and R.M.G. and that he wanted R.M.G. to remain with him. At the direction of Greg Kurupas, who was the agent-in-charge, Agent Sanchez contacted Debbie Perkins-McCall of the Texas Department of Family and Protective Services ("DFPS") in Lubbock. Since there

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[2] Agent Sanchez informed Castro that Amarillo law enforcement authorities wanted to question Gallardo as a possible witness in connection with a homicide.

was no evidence that R.M.G. was abused or neglected, Agent Sanchez was informed that DFPS would not get involved.[3] Meanwhile, Border Patrol processed Gallardo and his relatives and prepared to repatriate them back to Mexico. While in custody, Gallardo admitted he was in the United States illegally and chose to reinstate an earlier deportation order. The transport to Mexico from Lubbock left at 3:15 p.m. daily, and Border Patrol made plans to send Gallardo and his relatives at that time.

Around 1:30 in the afternoon, Castro and her relatives retained an attorney, Lisa Trevino, in order to obtain a temporary custody order. Trevino drafted the necessary paperwork and proceeded to the courthouse to get a judge's signature on the order. Trevino told Agent Kurupas that she was working on obtaining a judge's signature on a temporary custody order; however, the agent told her that the repatriation transport had to leave by 3:15 p.m. By the time the transport left, Trevino had been unable to obtain a judge's signature. Trevino never filed any documents with the state court regarding the custody

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[3] Perkins-McCall testified before the district court: "In December of 2003, I received a telephone call from a male Border Patrol Agent and he advised me that he had a Mexican citizen father with possession of his child and that the father was to be returned to Mexico. He further advised me that the mother sought possession of the child, but that the father did not want to relinquish possession of the child. The agent asked me if this was a situation in which our department would get involved. I asked the agent if there was any issue of abuse of the child or harm to the child and he advised me there was not. I told him that absent any issue of abuse of the child or harm to the child, the Texas Department of Family and Protective Services would not get involved."

of R.M.G., and she did not further pursue a custody order for Castro.

The transport left Lubbock around 3:15 p.m. on December 3, 2003 with Gallardo onboard, along with R.M.G. In September 2006, Gallardo was detained in the Amarillo area on charges of illegal reentry. While he was in custody, Gallardo and Castro came to an agreement whereby R.M.G., who was living in Mexico with Gallardo's parents, would be returned to the custody of Castro. R.M.G. was returned to Castro's custody on December 1, 2006.

Castro filed a lawsuit on February 10, 2006, in the United States District Court for the Southern District of Texas on her own behalf and as next friend of her daughter, R.M.G. In her original complaint, Castro sought monetary damages and injunctive relief pursuant to the Fourth, Fifth, and Tenth Amendments of the United States Constitution, as well as claims of negligence, intentional infliction of emotional distress, and false imprisonment against the United States pursuant to the FTCA. The district court dismissed Castro's constitutional claims for monetary relief, holding that such claims were barred by the doctrine of sovereign immunity. Castro then filed her First Amended Complaint on May 19, 2006. In this complaint, Castro asserted claims for injunctive relief under the Fourth and Fifth Amendments of the United States Constitution as well as claims of negligence, intentional infliction of emotional distress, false imprisonment, abuse of process, and assault pursuant to the FTCA. Castro also asserted a claim for injunctive and declaratory relief pursuant to 8 U.S.C. § 1101, *et. seq.*

On November 14, 2006, the Government filed a motion to dismiss pursuant to Rule 12(b)(1), and in the alternative, motion for summary judgment pursuant to Rule 56. The Government argued, *inter alia,* that the district court did not have subject matter jurisdiction over Castro's tort claims because they are barred by the discretionary function exception to the FTCA. On February 9, 2007, the district court granted the Government's motion to dismiss for lack of subject matter jurisdiction; the court also held that Castro's claims for relief under the Fourth and Fifth Amendments and her claim for injunctive relief pursuant to 8 U.S.C. § 1101, *et. seq.* were moot and therefore dismissed them as well. On April 4, 2007, the district court dismissed Castro's only remaining claim which sought declaratory relief "in the form of determination of the validity of any statute, regulation, policy or other procedure relied on to detain and deport Plaintiff R.M.G." for lack of standing. That same day, the district court entered its final judgment dismissing the action in its entirety with prejudice.

Castro timely filed her notice of appeal. The only issue Castro raises on appeal is whether the district court erred in dismissing her FTCA claims for lack of subject matter jurisdiction.

STANDARD OF REVIEW

"Whether the district court lacked jurisdiction to consider the government's conduct in this case is a question of law, subject to *de novo* review by this court." *Buchanan v. United States,* 915 F.2d 969, 970 (5th Cir. 1990) (citing *Baker v. United States,* 817 F.2d 560, 562 (9th Cir. 1987)). The party asserting

jurisdiction bears the burden of proof for a Federal Rule of Civil Procedure 12(b)(1) motion to dismiss. *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001). A motion under 12(b)(1) should be granted only if it appears certain that the plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction. *See Lane v. Halliburton,* 529 F.3d 548, 557 (5th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007)). "[U]nder Rule 12(b)(1), the court may find a plausible set of facts supporting subject matter jurisdiction by considering any of the following: '(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.'" *Lane,* 529 F.3d at 557 (quoting *Barrera-Montenegro v. United States,* 74 F.3d 657, 659 (5th Cir. 1996) (internal citations omitted)).

DISCUSSION

"As the sovereign, the United States is immune from suit unless, and only to the extent that, it has consented to be sued." *Truman v. United States,* 26 F.3d 592, 594 (5th Cir. 1994) (citing *Fed. Deposit Ins. Corp. v. Meyer,* 510 U.S. 471 (1994)). Through the FTCA, the United States has consented to suits "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment. . . ." 28 U.S.C. § 1346(b)(1); *see also Truman,* 26 F.3d at 594 ("Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions

of its agents who act within the scope of their employment.")

There are a number of statutory exceptions to the FTCA, two of which are relevant to the resolution of this appeal. First, the "intentional tort" exception provides that the FTCA does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). However, that same provision also waives sovereign immunity for the intentional torts of law enforcement and investigative officers. *Id.* (explaining that the FTCA shall apply "to acts or omissions of investigative or law enforcement officers of the United States Government . . . [for] any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.").[4]

The other relevant exception is the "discretionary function" exception, which provides that the United States is not liable for:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or

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[4] This court has previously addressed the congressional intent of § 2680(h): "Congress, in response to 'no knock' raids conducted by federal narcotic agents on the wrong dwellings, passed the 1974 amendment to the Federal Tort Claim Act to provide compensation [for the victims]." *Solomon v. United States*, 559 F.2d 309, 310 (5th Cir. 1977).

> perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a); *see also Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) ("[T]he government is not liable for any claim arising from the exercise of discretion in the performance of governmental functions or duty whether or not the discretion involved be abused.") (citing *Dalehite v. United States*, 346 U.S. 15, 33 (1953) (internal quotation marks omitted)). "The exception only covers acts that are discretionary in nature, acts that 'involve an element of judgment or choice.' " *Gaubert*, 499 U.S. at 322 (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). In *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984), the Supreme Court explained that it is the nature of the conduct and not the status of the government actor that governs whether the exception applies.

In *Gaubert*, the Supreme Court laid out a two-step test for determining whether the discretionary function exception applies to a federal employee's act or omission. First, the challenged government action must be "the product of judgment or choice." *Gaubert*, 499 U.S. at 322. This Court has explained:

> Under this prong, we determine whether a statute, regulation, or policy mandates a specific course of action. If such a mandate exists, the discretionary function exception does not apply and the claim may move forward. When no mandate exists, however,

> the governmental action is considered discretionary and the first prong is satisfied.

Garza v. United States, 161 Fed. Appx. 341, 343 (5th Cir. 2005) (internal citation omitted). Second, the court must decide whether the complained of judgment or choice "is of the kind that the discretionary function exception was designed to shield" because the purpose of the exception "is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and public policy through the medium of an action in tort." *Gaubert*, 499 U.S. at 322-23 (internal quotation marks and citations omitted). This Court has written that for this prong, "the appropriate inquiry is whether the act in question is susceptible to policy analysis." *Baldassaro v. United States*, 64 F.3d 206, 211 (5th Cir. 1995) (internal citation omitted).

As already noted, in the proceedings below, the district court granted the Government's motion to dismiss pursuant to Rule 12(b)(1). While the district court stated that the aforementioned "law enforcement provision" of § 2680(h) applied to Castro's assault, abuse of process, and false imprisonment claims, the court ultimately concluded that it lacked subject matter jurisdiction because her FTCA claims could not survive the discretionary function exception. The district judge first determined that the first prong of the *Gaubert* test was satisfied because the Border Patrol Agents' actions were the product of judgment or choice. In reaching that determination, she highlighted that Castro failed to obtain a custody order granting her custody of R.M.G., and because of that, she placed the Agents in a "difficult situation" – namely, they had to either forcibly remove R.M.G.

from Gallardo's custody even though there was no court order directing them to do so, or let Gallardo continue with possession of R.M.G., even though Gallardo was being repatriated to Mexico. After concluding that there were no statutes, regulations, or policies mandating that the Agents take a certain course of action in this situation[5] and rejecting Castro's argument that the Agents had made an unauthorized custody determination as to R.M.G., the district judge concluded that the Agents "were left to make a difficult decision, one that was a product of judgment or choice. . . ." She also held that the Border Patrol Agents' actions satisfied the second prong of the *Gaubert* test because their "decision was unequivocally subject to policy analysis, as it involved the use of government resources and necessarily involved a decision as to what the Border Patrol should do with a United States citizen child in the unique circumstances presented by such a case." *See, e.g., Baum v. United States,* 986 F.2d 716, 724 (4th Cir. 1993) (a decision as to the best allocation or use of resources is "inherently bound up in considerations of economic and political policy, and accordingly is precisely the type of governmental decision that Congress intended to insulate from judicial second-guessing. . . .").

On appeal, Castro argues that the district court unduly narrowed the coverage of the FTCA by improperly expanding the scope of the discretionary

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[5] The Government submitted evidence before the district court that: "there are no policies, rules or statutes governing the apprehension and detention of a foreign national in lawful custody of his or her U.S. juvenile child. . . ." Castro does not disagree with that assessment.

function exception. She contends that the district court wrongly interpreted and applied the holdings of *Gaubert* and related precedent, because, while the Border Patrol Agents' actions were the product of choice or judgment, their actions not only exceeded the scope of their authority, but also violated the federal Constitution. Further, according to Castro, the Agents' actions lacked any connection to the social or economic policy of the regulatory regime that establishes the authority of the Border Patrol. The Government urges this court to affirm the district court's determination, contending that the Agents' actions in this case are clearly covered by the discretionary function exception of the FTCA. It argues that the district court properly applied *Gaubert,* and that its judgment dismissing Castro's FTCA claims for lack of subject matter jurisdiction should be affirmed.

We first observe that we agree with the district court that the law enforcement proviso applies to some of Castro's FTCA claims since Border Patrol Agents are federal law enforcement officers for purposes of the FTCA. *See Ysasi v. Rivkind,* 856 F.2d 1520, 1524-25 (Fed. Cir. 1988) (explaining that Border Patrol Agents are federal law enforcement officers for the purposes of the FTCA). However, we disagree with the lower court's conclusions regarding the discretionary function exception. Even though an argument can be made that the district court properly analyzed the two *Gaubert* factors, that court erred by not first considering whether the Border Patrol Agents exceeded the scope of their authority. In *Sutton,* we explained: "[W]e have not hesitated to conclude that such action does not fall within the discretionary function exception of § 2680(a) when governmental

agents exceed the scope of their authority as designated by statute or the Constitution." 819 F.2d at 1293. This principle of law has been recognized by a majority of other circuits as well. *See, e.g., Raz v. United States,* 343 F.3d 945, 948 (8th Cir. 2003) ("We must also conclude that the FBI's alleged surveillance activities fall outside the FTCA's discretionary-function exception because [plaintiff] alleged they were conducted in violation of his First and Fourth Amendment rights."); *Medina v. United States,* 259 F.3d 220, 225 (4th Cir. 2001) (noting that the starting point of analysis is that "federal officials do not possess discretion to violate constitutional rights or federal statutes") (quoting *United States Fid. & Guar. Co. v. United States,* 837 F.2d 116, 120 (3d Cir. 1988)); *Nurse v. United States,* 226 F.3d 996, 1002 (9th Cir. 2000) (holding the Constitution limits the discretion of federal officials such that the discretionary function exception will not apply); *Prisco v. Talty,* 993 F.2d 21, 26 n. 14 (3d Cir. 1993) (concluding that the discretionary function exception was inapplicable to an FTCA claim based on conduct that violated plaintiff's constitutional rights); *Red Lake Band of Chippewa Indians v. United States,* 800 F.2d 1187, 1196 (D.C. Cir. 1986) ("A corollary to these principles, and our basis for affirming the district court's holding on this issue, is that a decision cannot be shielded from liability if the decisionmaker is acting without actual authority. . . . An employee of the government acting beyond his authority is not exercising the sort of discretion the discretionary function exception was enacted to protect."); *Birnbaum v. United States,* 588 F.2d 319, 329 (2d Cir. 1978) ("A discretionary function can derive only from properly delegated authority. Authority generally stems from a statute or

regulation, or at least from a jurisdictional grant that brings the discretionary function within the competence of the agency. Discretion may be as elastic as a rubber-band, but it, too, has a breaking point. An act that is clearly outside the authority delegated cannot be considered as an abuse of discretion." (internal quotation marks and citations omitted)); *but see Kiiskila v. United States,* 466 F.2d 626, 627-28 (7th Cir. 1972) (holding that conduct by commanding officer of military base, although "constitutionally repugnant," fell within the discretionary function exception).

Admittedly, this court and others have been less than clear about where this "scope of authority" analysis fits within the *Gaubert* factors: arguably some courts have treated it as a prerequisite, *see, e.g., Nurse,* 226 F.3d at 1001-02, while others have seemingly integrated it into the first *Gaubert* factor. *See, e.g., McElroy v. United States,* 861 F. Supp. 585, 593 (W.D. Tex. 1994). Nevertheless, it is overwhelmingly clear that, as the First Circuit has written, "courts have read the Supreme Court's discretionary function cases as denying protection to actions that are unauthorized because they are unconstitutional, prescribed by statute, or exceed the scope of an official's authority." *Thames Shipyard & Repair Co. v. United States*, 350 F.3d 247, 254 (1st Cir. 2003) (internal citations omitted). Because the Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception will not apply, if the Agents acted in violation of R.M.G.'s constitutional rights, and therefore outside their scope of authority, that conclusion would eclipse

the district court's analysis under the *Gaubert* framework.

We now turn to consider whether Castro sufficiently alleged that the Border Patrol Agents violated the scope of their authority here. In her complaint, Castro states that the Agents violated R.M.G's Fourth and Fifth Amendment rights when they detained her in immigration custody with Gallardo and his relatives even though they knew she was a U.S. citizen, and that such actions not only went beyond the scope of their authority, but also violated the constitution.[6] While it is well-recognized that violations of constitutional mandates are not actionable under the FTCA, *see Meyer,* 510 U.S. at 478 ("The United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims."), the occurrence of such a violation would involve the performance of a non-discretionary function for jurisdictional purposes, if the constitutional tort is also cognizable as an intentional tort under state law. As a federal district court explained:

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[6] *See, e.g.,* First Amended Complaint at paragraphs 36 ("despite Defendant's recognition of Plaintiff R.M.G.'s status as a U.S. citizen, Defendant United States intentionally, maliciously, and recklessly violated Plaintiffs' right to procedural due process guaranteed by the Fifth Amendment"), 69 (border officials "willfully detained R.M.G. without her consent or the consent of her U.S. citizen parent, and the detention was without legal authority or justification"), and 70 (once border officers "knew or should have known that R.M.G. was a U.S. citizen and that a U.S. citizen parent was present to take possession of her and did not release her, Defendant United States had no legal authority or justification to continue its detention of the child").

> [A] court must determine whether there is a specific and intelligible constitutional mandate that involves or is related to the alleged intentional torts of the accused officer(s). If such a mandate exists, the Court will conclude, for jurisdictional purposes only, that the alleged torts occurred during the performance of a non-discretionary function. Upon reaching such a conclusion, the Court may determine the merits of the section 2680(h) intentional tort claims under the applicable state tort law.

McElroy, 861 F. Supp. at 593-94. As the *McElroy* court recognized, "[t]he *Gaubert* test merely instructs the reviewing court to determine whether the alleged conduct 'involve[s]' mandatory compliance with a federal statute, regulation, or policy, not whether the statute, regulation, or policy was violated." *Id.* at 593 n. 16; *see also Garcia v. United States*, 896 F. Supp. 467, 475-76 (E.D. Pa. 1995) ("Because we cannot at this point preclude the possibility that the inspectors' conduct was unconstitutional, we cannot hold that the challenged conduct falls within the discretionary function exception."). Accordingly, the issue before us is whether the complaint and any properly-considered facts could support a finding that the Border Patrol Agents' alleged conduct exceeded the scope of their statutory or constitutional authority, not determining whether such a violation actually occurred.

We hold that Castro's complaint does sufficiently allege that the Border Patrol Agents' actions exceeded the scope of their authority. The Border Patrol, officially called The Bureau of Customs and Border Protection, is an agency of the Department of

Homeland Security, and is specifically included as a defined agency subject to the Immigration and Nationality Act of 1953 ("INA"), 8 U.S.C. § 1101 *et seq.* *See* 8 C.F.R. § 1.1. Fundamentally, the INA's scope is limited to regulating the entry of aliens as well as their detention, expulsion/removal, and naturalization. *See, e.g.,* 8 U.S.C. § 1103(a)(1); 8 U.S.C. § 1101(a)(23). Within this statutory grant of authority, Border Patrol Agents have, *inter alia,* broad discretion in making determinations in matters such as the detention, parole, or deportation of foreign nationals illegally present in the United States. *See, e.g.,* 8 U.S.C. § 1226; 8 C.F.R. §§ 236.1-236.7; *INS v. Yueh-Shaio Yang,* 519 U.S. 26, 30 (1996) (explaining the broad INS discretion in determining who, along a class of eligible aliens, may be granted relief from removal). However, the power of Border Patrol Agents to detain U.S. citizens is quite limited. While Border Patrol Agents possess a general arrest authority for crimes committed in their presence, 8 U.S.C. § 1357(a)(5), generally speaking they do not have authority to arrest or detain U.S. citizens. *See, e.g., United States v. Brignoni-Ponce,* 422 U.S. 873, 884 (1975) (writing that the Fourth Amendment "forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens").

The Government makes two arguments for why the Agents were within their statutory grant of authority. First, it cites 8 C.F.R. § 240.25(b) which states that immigration officials "may attach to the granting of voluntary departure any conditions [they] deem[ ] necessary to ensure the alien's timely departure from the United States. . . ." The Government contends that this is simply all the

Agents did here. Second, it cites 8 U.S.C. § 1103(a)(3) which provides that the Secretary of Homeland Security "shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." The Government then relies on language from *Gaubert* to make the argument that the Agents' actions were all planning-level decisions that are covered by the discretionary function exception. *See* 499 U.S. at 323 ("Where Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations by which the agencies are to carry out the programs.").

Both of these arguments are unavailing. The Government's first argument fails because, as Castro highlights, Gallardo was removed in December 2003 pursuant to the reinstatement of a prior order of removal and not by voluntary departure; therefore 8 C.F.R. § 240.25(b) is simply irrelevant. The Government's second argument is without merit because even though governmental actors have wide discretion to carry out their statutory and regulatory obligations, courts have never interpreted delegated authority so broadly as to infringe upon constitutionally-protected rights and freedoms. *See, e.g., Hernandez v. Cremer,* 913 F.2d 230, 237 (5th Cir. 1990) (explaining that courts should "construe narrowly all [Congressionally-] delegated powers that

curtail or dilute [constitutional protections.]" (citing *Kent v. Dulles*, 357 U.S. 116, 129 (1958))). The Government's contention that 8 U.S.C. § 1103(3) could be interpreted so broadly as automatically to override R.M.G.'s Fourth Amendment right from unreasonable seizure or her Fifth Amendment right to due process is simply untenable.

We are cognizant of the challenging circumstances in which Border Patrol Agents undoubtedly often find themselves because of the complexities of immigration enforcement, and we agree with the district court that, particularly in this instance, they were faced with a "difficult situation."[7] As such, we emphasize the narrowness of our holding. Had the Border Patrol Agents not known R.M.G.'s citizenship status or if they had doubted Castro's assertions that R.M.G. was a U.S. citizen, their decision to detain the child with her father would likely not be intertwined with the constitutional strands that are prominent in this appeal of a 12(b)(1) dismissal for lack of subject matter jurisdiction. However, here the Agents concede that they knew R.M.G. was a U.S. citizen.

Castro alleges a plausible set of facts supporting subject matter jurisdiction because based on her complaint, the Border Patrol Agents' actions in detaining R.M.G. implicate constitutional concerns and, therefore, may have been non-discretionary. We

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[7] Of course, while it is true that this entire situation could have been avoided had Castro obtained a custody order before the repatriation transport carrying Gallardo and R.M.G. left, ultimately Castro's actions are irrelevant in determining whether the Border Patrol Agents' actions are covered by the discretionary function exception.

hold that the district court legally erred in concluding that the discretionary function exception to the FTCA deprived it of jurisdiction without first determining whether the Agents' conduct was outside their scope of authority.[8] We remand this case for the district court to consider in the first instance to what extent the alleged constitutional violations are cognizable under Castro's FTCA claims. We highlight that our holding is limited to the jurisdictional question presented on appeal; nothing we have written should be interpreted to speak to the merits of either Castro's allegations of constitutional violations or her FTCA claims.

CONCLUSION

For the foregoing reasons, the judgment of the district court as to Castro's FTCA claims is REVERSED, and this case is REMANDED for proceedings not inconsistent with this opinion.

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[8] Accordingly, we need not address Castro's argument that the Agents also exceeded their authority by making a *de facto* custody determination.

JERRY E. SMITH, Circuit Judge, dissenting:

> *And the king said, Bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to the one, and half to the other.* 1 Kings 3:24-25.

We face a situation at least as old as the one faced by King Solomon, and one requiring his wisdom: what to do when two parents claim a child. I am no Solomon, and neither is the majority. I do not know the right answer, if there is one, and neither do my able colleagues. It is not the job of the federal courts to make that choice or to second-guess the decision of those to whom the heavy responsibility is given.

For two reasons, I respectfully dissent. First, the majority fundamentally misunderstands sovereign immunity and the Federal Tort Claims Act ("FTCA"), falling for the alluring but empty belief that if something really unfortunate occurs, someone always must pay. Prodded by that misunderstanding, the majority eviscerates much of the discretionary function exception, holding that *whenever* a Border Patrol officer violates the Constitution – even if he has no reason to know he is doing so – he *necessarily* acts beyond his discretion. The majority's approach subjects the United States to substantial liability that is neither authorized by statute nor compelled by precedent. Second, even under the majority's misguided theory, the United States should not be liable, because, under Castro's complaint, the Border Patrol agents did not violate R.M.G.'s constitutional rights or otherwise exceed their lawful authority.

I. The Majority Misunderstands Sovereign Immunity.

Because of sovereign immunity, matters of the federal fisc are left to the political branches unless the government has explicitly waived its immunity. *See Truman v. United States,* 26 F.3d 592, 594 (5th Cir. 1994). Under the FTCA, the United States has consented to certain types of suits, 28 U.S.C. § 1346(b), but the waiver of immunity is far from complete, and there are a number of exceptions, including the discretionary function exception, 28 U.S.C. § 2680(a), which denies subject-matter jurisdiction to the federal courts over a great deal of potentially unlawful conduct.[1] Likewise, consistently with the purposes and history of sovereign immunity, "the exceptions that do appear in the FTCA must be strictly construed in favor of the government." *Truman,* 26 F.3d at 594 (*citing Atorie Air, Inc. v. Fed. Aviation Admin.,* 942 F.2d 954, 958 (5th Cir. 1991)). These basic principles of sovereign immunity are not contested.

The majority nonetheless cites *dictum* from *Sutton v. United States,* 819 F.2d 1289, 1293 (5th Cir. 1987), and opinions from other circuits, for the astoundingly broad proposition that the FTCA's discretionary function exception does not apply *whenever* a federal official – even without good reason to know – violates someone's constitutional rights. Nothing in *Sutton,* however, turned on whether a constitutional right was violated; the defendants did not plead any such violation. *See id.* at 1291. Rather, the case concerned

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[1] The discretionary function exception bars "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty. . . whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

the interplay between the discretionary function exception and the intentional tort exception's "law enforcement proviso,"[2] with the entire matter remanded "because [the district court] decided [it] on inadequate factual allegations which prevent[ed] us from evaluating the appellants' cause of action in light of the differing statutory policies" of the two exceptions. *Id.* at 1292.

Thus, until now, *Sutton's* outlier and truncated musing that constitutional rights are somehow categorically outside of the discretionary function exception has not been the law of the Fifth Circuit. It is, first and foremost, irreconcilably inconsistent with Supreme Court precedent. For instance, it contravenes *United States v. Gaubert,* 499 U.S. 315, 322-23 (1991), which holds that the discretionary function bars federal jurisdiction to review a federal officer's conduct unless "a federal statute, regulation, or policy specifically prescribe[d] a course of action," provided that the decision was of the type that ought not be "second-guess[ed]" because it is "grounded in social, economic, and political policy. . . ." The omission of "Constitution" from the Court's explicit list of sources that can create a "mandate" that nullifies the discretionary function exception should be dispositive here.

This obvious reading of *Gaubert* finds additional support in *FDIC v. Meyer,* 510 U.S. 471, 478 (1994), which says that "the United States simply has not rendered itself liable under § 1346(b) [*i.e.*, the FTCA]

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[2] 28 U.S.C. § 2680(h). Castro does not allege that § 2680(h) has any bearing on this case.

for constitutional tort claims." If all violations of the federal constitution render the discretionary function exception inapt, *Meyer* is effectively voided. In sum, the majority's strained attempt to "eclipse the district court's analysis under the *Gaubert* framework" utterly fails.

It is difficult to conceive of a violation of a constitutional right that does not also give rise to a state cause of action. For instance, many violations of the Eighth Amendment by prison officials likely also constitute negligence under state law. Unconstitutional searches theoretically can be cognizable as trespass. Violations of the Third Amendment can be characterized as a trespass or an invasion of privacy. Until now, under *Meyer*, we lacked jurisdiction to consider these "constitutional tort claims."

Under the majority's framework, by a plaintiff's artful pleading, the United States can be liable whenever the Constitution is violated even though, under *Meyer,* the sovereign is not subject to liability for constitutional torts. The majority's two-step rubric would go like this: First, allege a constitutional violation, thereby avoiding the discretionary function exception. Second, plead a state cause of action that overlaps with that constitutional violation, then seek damages under that state cause of action. *Voila!* No more sovereign immunity.

Properly understood, however, federal sovereign immunity is more robust than that. In *Santos v. United States*, ___Fed. Appx. ___, No. 05-60237, 2006 WL 1050512 (5th Cir. Apr. 21, 2006) (per curiam) (unpublished), we affirmed the dismissal of a

prisoner's state law negligence claim that overlapped with his contention that the Eighth Amendment had been violated. The plaintiff argued that his negligence claims should go forward, despite the discretionary function exception, because "no one has discretion to violate another's constitutional rights." *Id.* at ___, *3. We promptly rejected that argument, holding that

> an inmate "may bring a[n] . . . action [under *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,* 40[3] U.S. 388[, 91 S.Ct. 1999, 29 L.Ed.2d 619] (1971),] against individual officers for a[n] alleged constitutional violation, but he may not bring an action against the United States, the [Bureau of Prisons, or its] officers in their official capacities as such claims are barred by the doctrine of sovereign immunity."

Id. (some alterations in original) (internal quotation omitted). Contrary to the reasoning in *Santos,* the majority's wholehearted invocation of *Sutton*'s *dictum* reads much of the discretionary function exception out of the federal code.

Under the majority's view, the United States may be liable for conduct even where its officers cannot be. This turns *Bivens* on its head. In *Meyer*, 510 U.S. at 485, the Court explained that it had "implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." In light of *Meyer,* it makes no sense to treat FTCA claims against the United States more liberally than we treat *Bivens* actions against individual federal officers, but that is exactly what the majority's holding means: Because of qualified

immunity, *Bivens* at least requires that constitutional rights be "clearly established" before liability ensues against federal officers, *see, e.g., Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982), but the majority's novel liability scheme against the United States apparently does not so require, because it reverses the district court without even pointing to what *clearly established* rights could have been violated under the facts Castro pleaded.[3]

Even if the Border Patrol violated R.M.G.'s constitutional rights, it did not violate any clearly established right.[4] Thus, even assuming that we should narrow the scope of the discretionary function exception so that it does not apply where the Constitution has been violated – a holding that would allow nearly every *Bivens* action also to be an action against the United States, contrary to *Meyer* – there has to be a limit. Before subjecting the United States to suit, at a minimum we ought to require that the

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[3] The majority is confused on this point. Quoting a district court, it states that the constitutional mandate must be "specific and intelligible." It then summarily states that "[w]e hold that Castro's complaint does sufficiently allege that the Border Patrol Agents' actions exceeded the scope of their authority." The majority does not explain, however, how a reasonable agent could have known that his conduct was violating a "specific and intelligible" constitutional mandate when he was exercising his discretion.

[4] Castro alleges that R.M.G.'s clearly established Fourth Amendment right to be free from unreasonable seizure was violated, but it is not clearly established that leaving a minor with his parent, in the absence of any court order dictating otherwise, is an unreasonable seizure.

constitutional "mandate" be clearly established with particularity, something that cannot be shown here.[5]

II. No Constitutional or Statutory Rights Were Violated.

Even if one accepts the majority's erroneous understanding of sovereign immunity, the district court was correct to dismiss for lack of subject-matter jurisdiction, because no constitutional rights were violated. The notion that the Border Patrol agents unconstitutionally "placed in custody" or "detained" R.M.G., a baby less than one year old, is false on its face. We routinely allow parents to make decisions that affect their children's constitutional rights,[6] and it is not contested that Gallardo consented to R.M.G.'s being taken with him to the Border Patrol station, just

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[5] The concern that constitutional rights at least be clearly established before the United States can be liable is in line with the direction taken in *Nurse v. United States,* 226 F.3d 996, 1002 n. 2 (9th Cir. 2000), which expressly reserved the issue: "[W]e do not make any decision regarding the level of specificity with which a constitutional proscription must be articulated in order to remove the discretion of a federal actor."

[6] Indeed, parents can consent to conduct that would otherwise constitute a violation of a child's core Fourth Amendment rights. *See, e.g., Roe v. Tex. Dep't of Protective & Regulatory Servs.,* 299 F.3d 395, 407-08 (5th Cir. 2002) (holding that a social worker must demonstrate probable cause and obtain a court order, *obtain parental consent,* or act under exigent circumstances to justify the visual body cavity search of a juvenile in the residence); *Dubbs v. Head Start, Inc.,* 336 F.3d 1194, 1207 (10th Cir. 2003) (stating, in deciding whether a government program that gave children physical exams, which included blood tests and examination of genitalia, violated the Constitution, that "if the trier of fact concluded that the parents in this case, on behalf of their minor children, actually consented to the examinations, there would be no Fourth Amendment violation").

as he consented to the baby's going with him to Mexico. This explicit parental consent means that R.M.G.'s constitutional rights were not violated.[7] Make no mistake, she was not arrested, detained, held in custody, or deported – she was with *her father* and with *his consent*.

Castro also claims the agents acted beyond their statutory powers because the Border Patrol was never affirmatively authorized to allow non-citizen parents to consent to bringing their citizen children with them to detention centers and other countries by means of government deportation vehicles. This is equally unavailing, because the power to allow parents to consent to take their children with them is ancillary to the government's power to detain and deport. [8]

To make the matter straightforward, what if both of R.M.G.'s parents were illegal aliens? Would the Border Patrol be forbidden, by a statute or the Constitution, from allowing her parents to consent to take her to the detention center while they waited to be deported? Would the agents be forbidden to allow them to consent to carry her with them on the government transport vehicle to Mexico? To ask these questions is to answer them. Does anyone doubt that

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[7] The majority accurately quotes paragraph 36 of the First Amended Complaint, but that paragraph says nothing to explain what alleged actions were taken in supposed violation of the Constitution. Accordingly, the issue is waived and was properly dismissed. *See Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 316-17 (5th Cir. 2000) (noting that arguments raised for the first time on appeal will not be considered).

[8] Castro acknowledges *some* ancillary powers, such as the power to take R.M.G. to the station in a Border Patrol vehicle.

the Border Patrol is authorized, as part of its discretionary authority, to allow families to stay together while it detains and deports?

The question of what to do with a child who is an American citizen, when one or both parents are not, is part of how the Border Patrol implements our immigration regime's "general provisions," and such difficult decisions are exactly the type that "involv[e] the necessary element of choice and [are] grounded in the social, economic, or political goals of the statute" that the discretionary function exception protects. *Gaubert*, 499 U.S. at 323. It seems that under the majority's view, the Border Patrol violates both constitutional and statutory law when it "detains" a citizen child along with the child's Mexican-national parents, especially when it permits the child's parents to take him with them to Mexico.

Likewise, if we accept the proposition that if Border Patrol agents make a custody determination, they act beyond their statutory authority, Castro's claim should still be dismissed, because the agents did not make a custody determination. Instead, they elected not to interfere with the *status quo* as R.M.G.'s parents had left it. If the government had forcibly taken R.M.G. and given her to Castro, that would be picking Castro over Gallardo; if Castro had R.M.G., and the government physically took R.M.G. and gave her to Gallardo, that would be picking him over Castro. Preserving the *status quo,* however, was not making a custody determination, but instead was merely respecting the parents' private ordering.[9]

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[9] Nor did the government make a *de facto* custody determination, a doctrine recognized in another context in *Suboh*

In fact, it is the majority that now makes an *ex post* custody determination by establishing the rule that custody of a child born to an American citizen and an illegal alien is presumptively granted to the American-citizen parent. That may be a fine default rule, but it is not for a federal court of appeals to delve into family law, traditionally the exclusive province of the states. [10]

Furthermore, because this new custody rule does not actually affect Castro but will affect prospective custody determinations, it is more akin to a policy. And when state custody law is silent, the relevant state agency says it will not get involved, and the Border Patrol is confronted with a custody matter and decides to retain the *status quo* as the parents left it, it is not the role of the federal courts to second-guess and decide which policy is best. Castro alleges the Border Patrol acted without authority and rendered a *de facto* custody determination, but in fact it is the majority that acts without authority and announces a *de jure* custody policy.

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v. Dist. Attorney's Office, 298 F.3d 81 (1st Cir. 2002). The agents had to do *something* with R.M.G.; they called the Texas Department of Family and Protective Services, which responded that it "would not get involved," because R.M.G. was not being abused. The majority acknowledges the dilemma the agents faced.

[10] *See Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) ("We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber* [*v. Barber*, 62 U.S. 582 (1858)], divests the federal courts of power to issue divorce, alimony, and child custody decrees.").

The agents were faced with the following unfortunate situation: Gallardo was detained; Castro had left the home days before; R.M.G., a baby, could not be left alone; Gallardo wanted R.M.G. to go with him; Gallardo had legal right to R.M.G., and no court order had deprived Gallardo of that right; Castro also wanted to take the child, but she had no court order and thus no superior right; Texas officials expressly said that the state would not take R.M.G., because she was not being abused; Texas law is opaque on what to do when two parents with equal right disagree about where a child should live, but the better reading of Texas law is that the parent with possession is authorized to choose[11]; Gallardo had actual possession of R.M.G., and he wanted her to go with him to Mexico.

In this difficult dilemma, the agents did the best that they could, and the choice they made was the one that least enmeshed the federal government in state custody issues. It is hard to imagine a more appropriate case for invoking the discretionary function exception.

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[11] Castro repeatedly refers to *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976), which states the factors that Texas courts consider in deciding custody and which does not expressly include, as a factor, which parent has actual possession. From this Castro argues that possession does not matter under Texas law.

This misses something important. Without first obtaining a court order, the parent seeking custody cannot call the police and require them to transfer possession of the child. In other words, in the absence of an order, Texas *does* recognize the *status quo*, at least as to whether the formal power of the state will be exercised.

III. Conclusion.

No one is pleased that Castro did not see her daughter for three years,[12] but as a legal matter, the discretionary function exception applies. The first prong of *Gaubert* was satisfied, because the Border Patrol agents' decisions were "the product of judgment or choice." *Gaubert,* 499 U.S. at 322. The choices made, moreover, were constitutional, because R.M.G. was neither unlawfully detained nor deported, but instead was properly held by her father's consent. The second prong of *Gaubert* was also satisfied, because the agents' decisions were not of the sort that should be "second-guess[ed]," *id.* at 323, given that the question of what to do with a citizen child when the parent with possession is deported, and state and federal law are silent, is a policy matter best left to the agency. Faced with a bad situation, the agents decided to retain the *status quo* as between the parents.

Because the district court was correct to dismiss for lack of subject-matter jurisdiction based on the discretionary function exception, I respectfully dissent.

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[12] If the Border Patrol agents had taken possession from Gallardo, the facts would have been hard, too; it is unfair to a father to say that he must leave his daughter merely because his wife is a citizen and he is not. Faced with a Solomon-splitting-the-baby situation, the agents decided to leave matters as the parents had left them.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
CORPUS CHRISTI DIVISION

Civil Action No. C-06-61

MONICA CASTRO et al.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

February 9, 2007, Decided
February 9, 2007, Filed

OPINION BY: Janis Graham Jack

OPINION

ORDER

On this day came on to be considered the United States' motion to dismiss for lack of subject matter jurisdiction, as well as the United States' motion for summary judgment (D.E. 29, 30).[1] For the reasons set

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[1] The United States filed a single document (D.E. 29, 30 (the same document filed twice)), asking the Court to dismiss Plaintiffs' claims pursuant to *Federal Rule of Civil Procedure*

forth below, the Court GRANTS the United States' motion to dismiss Plaintiffs' tort claims for lack of subject-matter jurisdiction, the Court finds that Plaintiffs' claims for relief under the *Fourth* and *Fifth Amendments to the United States Constitution* are MOOT and are therefore DISMISSED, and the Court finds that Plaintiffs' claim for injunctive relief pursuant to *8 U.S.C. § 1101, et. seq.,* is also MOOT and is hereby DISMISSED.

I. Jurisdiction

The Court has jurisdiction over this action pursuant to *28 U.S.C. § 1331* (federal question) and *28 U.S.C. § 1346(b)(1)* (suit against the United States).

II. Factual Background

The following facts are not in dispute: Plaintiff Monica Castro, a United States citizen, moved with her parents from Corpus Christi, Texas to the Lubbock, Texas area when she was approximately fifteen years old. (PX-E, Attachment to DX-A, Castro Decl., p. 1). Around the time that Ms. Castro was fifteen years old, she met Omar Gallardo, an illegal alien and Mexican national who lived in the same area as Ms. Castro. (DX-A, PX-A, Castro Dep., 12:2-20; Castro Decl., p. 1). When Ms. Castro was sixteen, she and Mr. Gallardo moved in together in a trailer near the trailer rented by Ms. Castro's parents. (Castro Dep., 13:10-24). Ms. Castro became pregnant, and on December 4, 2002, Ms. Castro gave birth to her and

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12(b)(1), and in the alternative, seeking summary judgment on certain of Plaintiffs' claims against the Defendant.

Mr. Gallardo's child, R.M.G. (Castro Dep., 14:3-4; Castro Decl., p. 1). R.M.G., a United States citizen, was born at the University Medical Center in Lubbock, Texas. (DX-J, PX-V, Certificate of Birth). Ms. Castro was seventeen at the time of R.M.G.'s birth.[2]

Ms. Castro and Mr. Gallardo had a history of arguing with one another. (Castro Dep., 27: 4-9; DX-H, PX-U, Gallardo Dep., 13:2- 10). Ms. Castro now maintains that Mr. Gallardo abused Ms. Castro during the course of their relationship, although Ms. Castro did not inform her parents or law enforcement authorities of this abuse. (Castro Dep., 22:2-23:24, 27:10-12; Castro Decl., pp. 1-2; DX-B, Rodriguez Dep., 8:24-9:4; DX-C, PX-W, Cendy Castro Dep., 15:13-21, 16:12-19). Ms. Castro maintains that Mr. Gallardo was a good father to R.M.G., and that he never abused his daughter. (Castro Dep., 32:24-25, 39:18-40:17, 86:3-10, 99:13-15).

On November 28, 2003, Ms. Castro and Mr. Gallardo got into an argument. (Castro Decl., 2). Ms. Castro called her grandparents, who also lived in the

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[2] Ms. Castro and Mr. Gallardo may have had a common-law marriage in Texas. There is some dispute as to whether Ms. Castro and Mr. Gallardo had a legally established common-law marriage as of the time of R.M.G.'s birth. In Plaintiffs' response to the United States' motion (D.E. 34), Plaintiffs maintain that Ms. Castro could not have agreed to a common-law marriage until her 18th birthday, which was on April 30, 2003, after R.M.G. was born. (*Id.*). Regardless, there is no dispute that Mr. Gallardo is R.M.G.'s father, both Mr. Gallardo and Ms. Castro are in agreement that R.M.G. is Mr. Gallardo's biological child. (Castro Decl., p. 3; PX-B, Sanchez Decl., p. 2; DX-H, PX-U, Gallardo Dep., 23:24, 25:3-6; Certificate of Birth).

Lubbock area, to come and pick her up at the trailer she shared with Mr. Gallardo and R.M.G. (Castro Dep., 28:9-12; Castro Decl., p. 2). Ms. Castro's grandparents arrived to pick her up on November 29, 2003. (Castro Dep., 29:10-21). Ms. Castro left the trailer with her grandparents, and R.M.G. remained with Mr. Gallardo. (Castro Dep., 30:11-22; Castro Decl., pp. 2-3). Immediately thereafter, Ms. Castro commenced efforts to recover R.M.G. from Mr. Gallardo. (Castro Dep., 30:20-25; Castro Decl., p. 3). Ms. Castro contacted the Lubbock County Sheriff's Department, Texas Child Protective Services, and the Lubbock Police Department regarding the situation with R.M.G. (Castro Dep., 30:20-25, 45:7-11; Castro Decl., p. 3; PX-R, Sanchez Mem., p. 1). The agencies told Ms. Castro that since Ms. Castro and Mr. Gallardo were married (pursuant to a common-law marriage), and because Mr. Gallardo was the child's father, that Mr. Gallardo had as much right to R.M.G. as did Ms. Castro.[3] (Castro Dep., 31:24-32:10; Rodriguez Dep., 11:25-12:12; Castro Decl., p. 3). Ms. Castro was told that her issues with Mr. Gallardo constituted a civil dispute, and Ms. Castro would have to hire a private attorney to seek a custody order. (Castro Dep., 31:24-32:10; Castro Decl., p. 3). Child Protective Services did tell Ms. Castro that she could come fill out an application to start the process for obtaining assistance from Child Protective Services. (Castro Dep., 32:8-16). Child Protective Services told

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[3] As noted above, Ms. Castro and Mr. Gallardo may have had a common-law marriage in Texas. This Court makes no determination as to whether or not Ms. Castro and Mr. Gallardo were legally married at the time of the events in question.

Ms. Castro that this process would take one to two days. (Castro Dep., 32:11). Ms. Castro did not fill out the application, because she said she did not want to wait the one to two days. (Castro Dep., 32:17-23).

On December 1, 2003, Ms. Castro, along with her aunt Sophia Rodriguez, went to the Lubbock Border Patrol station to report Mr. Gallardo as an illegal alien. (Castro Dep., 35:9-23; Castro Decl., p. 3; Rodriguez Dep., 10:4-16; DX-D, Sanchez Decl., p. 1; PX-B, Sanchez Dep., 114:2-117:14; Sanchez Mem., p. 1). They spoke with Border Patrol Agent Manuel Sanchez. (Castro Dep., 35:9-23; Sanchez Decl., p. 1; Sanchez Mem., p. 1; Castro Decl., p. 3). Ms. Castro informed Agent Sanchez that R.M.G. was currently with Mr. Gallardo, and that Ms. Castro was seeking to recover R.M.G. from Mr. Gallardo.[4] (Castro Dep., 39:3-6; Rodriguez Dep., 10:20-11:1; Sanchez Decl., p. 1; Sanchez Mem., p. 1; DX-F, Kurupas Decl., pp. 1-2; Sanchez Dep., 114:4-9). At this initial meeting, Agent Sanchez informed Ms. Castro that she needed to get a court order for temporary custody of R.M.G. (Sanchez Dep., 115:24-116:6). Agent Sanchez asked Ms. Castro to be present when Border Patrol went to the trailer to apprehend Mr. Gallardo and certain of his illegal alien relatives. (Castro Dep., 41:1-23, 96:3-6; Castro Decl., p. 3; Rodriguez Dep., 11:6-12; Sanchez Decl., p. 3; Sanchez Mem., p. 2; Kurupas Decl., p. 2). Agent Sanchez informed Ms. Castro that if she were present, Border Patrol could question everyone regarding their

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[4] Of note, Mr. Sanchez also informed Ms. Castro that Amarillo law enforcement authorities wanted to question Mr. Gallardo as a possible witness in connection with a homicide. (Castro Dep., 35:23-36:10, 39:7-17).

citizenship and then leave R.M.G. with Ms. Castro, since she both Ms. Castro and R.M.G. are United States citizens. (Sanchez Decl., p. 3; Sanchez Mem., p. 2; Kurupas Decl., p. 2; Sanchez Dep., 130:13-25, 142:9-13, 151:16-24). However, Ms. Castro did not wish to be present at the time Border Patrol apprehended Mr. Gallardo and his relatives, Ms. Castro maintained that she was scared of what Mr. Gallardo and his family would do to her, and she did not want to be present when Border Patrol arrived. (Castro Dep., 41:1-23; Sanchez Decl., p. 3; Sanchez Mem., p. 2). Accordingly, Ms. Castro was not present when Border Patrol arrived in the morning of December 3, 2003 at the trailer that Ms. Castro had shared with Mr. Gallardo. (Castro Dep., 58:25-59:25; Castro Decl., p. 3; Sanchez Decl., p. 4). Rather, Ms. Castro watched the events unfold from her relatives' trailer across the street. (Castro Dep., 58:25-59:25; Castro Decl., p. 4).

Border Patrol took Mr. Gallardo, three of his brothers and his cousin to the Lubbock Border Patrol station. (Sanchez Decl., p. 4; Sanchez Mem., p. 3; Kurupas Decl., p. 1; Galladro Dep., 15:4-20). Mr. Gallardo had R.M.G. with him, so R.M.G. also went to the station. (Kurupas Decl., p. 1; Sanchez Mem., p. 3; Gallardo Dep., 17:13-17). Mr. Gallardo, R.M.G. and Mr. Gallardo's relatives remained in a holding cell at the station. (Sanchez Dep., 160:11- 161:7; PX-C, Crump Dep., 64:6-7).

Shortly thereafter Ms. Castro also arrived at the station, and she requested that her daughter be returned to her rather than remaining with Mr. Gallardo. (Castro Dep., 63:14-65:25; Castro Decl., pp. 4-5; PX-M, Kurupas Dep., 94:24-25, 96:3-11). However,

Mr. Gallardo informed Border Patrol that Ms. Castro had walked out on him and R.M.G., and he wanted R.M.G. to remain with him. (Sanchez Decl., pp. 4-5; Sanchez Mem., p. 3; Kurupas Decl., p. 2). At the direction of Agent in Charge Greg Kurupas, Agent Sanchez contacted the Texas Department of Family and Protective Services in Lubbock ("DFPS"), to inquire as to R.M.G. (Sanchez Decl., p. 5; Sanchez Mem., p. 3; DX-E, Perkins-McCall Decl., p. 1; Kurupas Decl., p. 2; Kurupas Dep., 98:4-11). DFPS asked if R.M.G. appeared as if she had been abused. (*Id.*). Agent Sanchez responded in the negative, he said that R.M.G. appeared to be well taken care of and in good health. (*Id.*). DFPS informed Agent Sanchez that given the circumstances, if the child was not abused or in any danger, they would not get involved. (*Id.*).

Border Patrol processed Mr. Gallardo and his relatives and prepared to repatriate them back to Mexico. (Sanchez Dep., 159:23- 160:7, 163:5-164:8, 181:15-162:8). The transport to Mexico from Lubbock left by 3:15 each day, so Border Patrol planned to send Mr. Gallardo and his relatives by that time. (Sanchez Dep., 86:11-21).

Around 1:30 in the afternoon, Ms. Castro and her relatives engaged an attorney, Lina Trevino, to obtain a temporary custody order of R.M.G. for Ms. Castro. (Castro Dep., 67:16-25, 69:10-17, 73:20-75:15; Castro Decl., p. 5). Ms. Trevino drafted the necessary paperwork and proceeded to the courthouse to obtain a Judge's signature on the order. (Castro Dep., 75:2-23; Castro Decl., p. 5; PX-H, Trevino Dep., 16:2-6; 18:14-20:9). However, Ms. Trevino never filed any documents with the state court, rather Ms. Trevino intended to

wait for a Judge's signature and then later file the papers. (Trevino Dep., 18:14-25). Ms. Trevino called Border Patrol Agent in Charge Greg Kurupas to inform him that she was working on obtaining a Judge's signature on a temporary custody order. (Kurupas Decl., pp. 2-3; Castro Dep., 75:17-76:3; Trevino Dep., 16:9-18:12, 20:10-21:8). Agent Kurupas told Ms. Trevino that the repatriation transport had to leave by 3:15 p.m. (Kurupas Decl., p. 2; Exh. 1 to Kurupas Decl., Repatriation Agreement; Trevino Dep., 20:10-21:8). By the time the repatriation transport left Lubbock, Ms. Trevino was not able to obtain a Judge's signature on the temporary custody order. (Castro Dep., 76:4-7; Castro Decl., p. 5; Trevino Dep., 21:9-22:2). Ms. Trevino did not file any papers regarding custody of R.M.G., and she did not further pursue a custody order for Ms. Castro. (Trevino Dep., 23:10-24:22).

The repatriation transport vehicle left Lubbock around 3:15 on December 3, 2003, with Omar Gallardo on board with his and Ms. Castro's daughter R.M.G. (Kurupas Decl., p. 3).

Shortly after Mr. Gallardo and R.M.G. went to Mexico, Ms. Castro returned to live with her parents in Corpus Christi. (Castro Dep., 77:12-16; Castro Decl., p. 5).

In September, 2006, Mr. Gallardo was detained in the Amarillo area on charges of illegal re-entry (8 U.S.C. § 1326(a) (1)).[5] While Mr. Gallardo was in

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[5] Case No. 2:06-cr-00068, United States District Court for the Northern District of Texas, Amarillo Division, assigned to the Hon. Mary Lou Robinson. Mr. Gallardo pled guilty to the offense

custody, Mr. Gallardo and Ms. Castro came to an agreement whereby R.M.G., who was living in Mexico with Mr. Gallardo's parents, would be returned to the custody of Ms. Castro. (Galladro Dep., 44:10-24; DX-J, Stipulation Agreement). R.M.G. was returned to Ms. Castro's custody on December 1, 2006.

III. Procedural Background

Ms. Castro filed the instant case on February 10, 2006, on her own behalf and as next friend of her daughter R.M.G. (together, "Plaintiffs") (D.E. 1). In Plaintiffs' original Complaint, Plaintiffs sought monetary damages and injunctive relief pursuant to the Fourth, Fifth and Tenth Amendments to the United States Constitution, and Plaintiffs also brought claims against the United States for negligence, intentional infliction of emotional distress, and false imprisonment (pursuant to the Federal Tort Claims Act). Pursuant to a motion to dismiss filed by the United States (D.E. 17), this Court dismissed Plaintiffs' constitutional claims for monetary relief, as such claims "are barred by the doctrine of sovereign immunity." (D.E. 26, p. 2). Plaintiffs filed their First Amended Complaint ("Amended Complaint") on May 19, 2006 (D.E. 22). In their Amended Complaint, Plaintiffs assert claims for injunctive relief under the Fourth and Fifth Amendments to the United States Constitution, as well as claims for negligence,

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and on December 19, 2006, Mr. Gallardo was sentenced to ninety days in the custody of the Federal Bureau of Prisons, with credit for time served since September 21, 2006. (D.E. 34, 35, 36, Case No. 2:06-cr-00068, United States District Court for the Northern District of Texas).

intentional infliction of emotional distress, false imprisonment, abuse of process, and assault (pursuant to the Federal Tort Claims Act). (Amended Complaint, ¶¶ 28-43, 54-77). Plaintiffs also assert a claim for injunctive and declaratory relief pursuant to 8 U.S.C. § 1101, et. seq.[6] (*Id.* at pp. 44-49).

The United States filed its motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) (1), and in the alternative, motion for summary judgment, on November 14, 2006 (D.E. 29, 30). The United States argues that this Court does not have subject matter jurisdiction over Plaintiffs' tort claims against the Defendant, because they are barred by the discretionary function exception to the Federal Tort Claims Act. In the alternative, the United States also argues that Defendant is entitled to summary judgment on Plaintiffs' tort claims against the United States (for negligence, intentional infliction of emotional distress, false imprisonment, abuse of process and assault). The United States has offered evidence in support of its motion, including excerpts from the depositions of Plaintiff Monica Castro, Ms. Castro's mother Cendy Castro, and Ms. Castro's Aunt Sophia Rodriguez, as well as Declarations from Border Patrol Agents Manuel Sanchez and Greg Kurupas. (*See* D.E. 29, Attachments, DX-A to DX-K).[7]

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[6] Defendant's motion does not address Plaintiffs' claim for injunctive and declaratory relief pursuant to 8 U.S.C. § 1101, *et. seq.*

[7] Defendant also filed a reply brief in support of its motion (D.E. 35). Defendant did not file a motion seeking permission to file its reply brief, as is required by the Court's Scheduling Order in this case. (D.E. 11, Scheduling Order, P4 ("No reply to the

Plaintiffs filed their response to the United States' motion on January 13, 2007 (D.E. 34).[8] Plaintiffs argue that the discretionary function exception to the Federal Tort Claims Act does not apply in this case, and that there are factual issues that preclude summary judgment on Plaintiffs' tort claims against the United States. Plaintiffs have submitted evidence in support of their response, including excerpts of the depositions of Plaintiff Monica Castro, Attorney Lina Trevino, and Border Patrol Agents Manuel Sanchez, Andrea Crump and Greg Kurupas. (*See* D.E. 34, Attachments, PX-A to PX-Z).

IV. Discussion

A. Standard for 12(b)(1) Motions to Dismiss

"Motions filed under Rule 12(b) (1) of the Federal Rules of Case 2:06-cv-00061 Document 39 Filed 02/09/2007 Page 12 of 28 Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *see also* Fed. R. Civ. P. 12(b) (1). A court may find lack of subject

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opposition to a motion will be filed by movant without leave of Court on good cause")). However, in the interests of justice, the Court will treat Defendant's reply as if Defendant had filed the required motion for leave to file a reply brief, and the Court will consider Defendant's reply brief in determining whether to grant or deny Defendant's motion.

[8] The Court granted Plaintiffs' request for an extension of time to respond to the Defendant's motion (D.E. 32). Plaintiffs' response was due on January 15, 2007. (D.E. 33).

matter jurisdiction "on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996) (internal citations omitted). "The burden of proof for a Rule 12(b) (1) motion to dismiss is on the party asserting jurisdiction." *Ramming*, 281 F.3d at 161; *see also McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995) ("On a 12(b) (1) motion, challenging the jurisdiction of the court, the burden lies with the party invoking the court's jurisdiction").

"A motion under 12(b) (1) should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Home Builders Ass'n of Mississippi, Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998); *see also Trans-Serve, Inc. v. United States*, 2003 U.S. Dist. LEXIS 24245, 2003 WL 23269560, *2 (W.D. La. 2003) ("Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief."); *Russell v. Choicepoint Servs., Inc.*, 302 F.Supp.2d 654, 658 (E.D. La. 2004) (same).

B. Plaintiffs' Tort Claims Are Barred by the Discretionary Function Exception to the Federal Tort Claims Act

1. Sovereign Immunity and the Federal Tort Claims Act

"[T]he United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued." *Hebert v. United States*, 438 F.3d 483, 487 (5th Cir. 2006); *Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994) ("As the sovereign, the United States is immune from suit unless, and only to the extent that, it has consented to be sued") (citing *FDIC v. Meyer*, 510 U.S. 471 (1994)). Sovereign immunity is jurisdictional in nature. See *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Such immunity protects the United States from liability, and deprives the court of subject-matter jurisdiction over claims against the United States. See *Hebert*, 438 F.3d at 487-88 (citing *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). Thus, before a court proceeds on a case against the United States, it "must first decide whether one of the government's several waivers of sovereign immunity applies." *Truman*, 26 F.3d at 594.

The Federal Tort Claims Act provides consent for suit against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1); see also *Johnston v. United States*, 85 F.3d 217, 218-19 (5th Cir. 1996); *Truman*, 26 F.3d at 594 ("Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its

agents who act within the scope of their employment").[9]

2. Discretionary Function Exception to the Federal Tort Claims Act

The "discretionary function" exception to the Federal Tort Claims Act provides that the United States is not liable for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of

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[9] Of note, there is an exception to the Federal Tort Claims Act, which provides that the Act does not apply to "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). However, the Federal Tort Claims Act's waiver of immunity still applies to allow a plaintiff to proceed on claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution if the actions complained of are "acts or omissions of investigative or law enforcement officers of the United States Government." *Id.*; *see also Jeanmarie v. United States*, 242 F.3d 600, 603-04 (5th Cir. 2001); *Cross v. United States*, 159 Fed. Appx. 572, 576 (5th Cir. 2005). This law enforcement proviso of 28 U.S.C. § 2680(h) applies to Plaintiffs' assault, abuse of process and false imprisonment claims against the Defendant. This is because the actions Plaintiffs complain of were those taken by Border Patrol Agents, and Border Patrol Agents are federal law enforcement officers for purposes of the Federal Tort Claims Act. See *Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988) (holding that Border Patrol Agents are federal law enforcement officers for the purposes of the law enforcement proviso of 28 U.S.C. 2680(h)); *Sanchez v. Rowe*, 651 F. Supp. 571, 573 (N.D. Tex. 1986) (finding that a Border Patrol Agent is "a law enforcement officer within the meaning of the FTCA"). *United States v. Ortiz*, 422 U.S. 891, 906, (1975) ("The Border Patrol has approximately 1,700 agents, who are well-trained law enforcement officers").

a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); *see also United States v. Gaubert*, 499 U.S. 315, 322 (1991). "The exception only covers acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.'" *Gaubert, 499 U.S. at 322* (citing *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). "It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984); see also *ALX El Dorado, Inc. v. Southwest Sav. & Loan Ass'n*, 36 F.3d 409, 411-12. (5th Cir. 1994) ("In determining whether the discretionary function exception bars a suit against the government, the focus of the inquiry is on the nature of the action taken and on whether that action is subject to policy analysis.").

In *Gaubert*, the Supreme Court established a two-prong test in order to determine when the discretionary function exception applies to a plaintiff's claim.

> For the exception to apply, the first prong requires that the challenged governmental action be the product of judgment or choice. Under this prong, we determine whether a statute, regulation, or policy mandates a specific course of action. If such a mandate exists, the discretionary function exception does not apply and the claim may move forward. When no mandate exists, however, the governmental action is considered discretionary and the first prong is satisfied.

> The second prong requires that the judgment or choice be based on considerations of public policy. Under this prong, we determine whether the judgment is grounded in social, economic, or political policy. If the judgment of the governmental official is based on any of these. policy considerations, then the discretionary function exemption applies and the claim is barred.

Garza v. United States, 161 Fed. Appx. 341, 344 (5th Cir. 2005) (internal citations omitted); *see also Theriot v. United States*, 245 F.3d 388, 397 (1998) (citing *Gaubert*, 499 U.S. at 322-24) (For the discretionary function exception to apply, '[f]irst, the conduct must be discretionary in nature, that is it must 'involv[e] an element of judgment or choice.' Second, the judgment or decision must be grounded on considerations of social, economic, or political public policy."). This second prong has also been classified as encompassing conduct that the "discretionary function exception was designed to shield." *Tremblay v. United States*, 261 F. Supp.2d 730, 734 (S.D. Tex. 2003) (citing *Berkovitz*, 486 U.S. at 536).

3. The Border Patrol Agents' Actions Were the Product of Judgment or Choice

The first prong of the *Gaubert* test requires that the challenged governmental action be the product of "judgment or choice." *Gaubert*, 499 U.S. at 322. This prong is not satisfied if a statute, regulation, or policy mandates a specific course of action. *See Garza*, 161 Fed. Appx. at 344. For the reasons set forth below, the Border Patrol Agents' decision to let R.M.G.

accompany her father back to Mexico was the product of a judgment or choice, and the Border Patrol Agents' conduct in the situation was not mandated by any statute, regulation or policy.

a. Actions of Ms. Castro Led to Difficult Choice for the Border Patrol Agents

Ms. Castro left R.M.G. in the trailer with Mr. Gallardo on November 29, 2003, and immediately thereafter she contacted the Lubbock County Sheriff's Department, the Lubbock Police Department, and Texas Child Protective Services regarding her situation. (Castro Dep., 30:20-25, 45:7-11; Castro Decl., p. 3; Sanchez Mem., p. 1). All of these agencies told Ms. Castro that in order for her daughter to be returned to her from Mr. Gallardo, **Ms. Castro would have to obtain an order granting her custody of R.M.G.** (Castro Dep., 31:24-32:10; Rodriguez Dep., 11:25-12:12; Castro Decl., p. 3). However, even after receiving this information, Ms. Castro took no action regarding a custody order. (*Id.*). Rather, Ms. Castro waited two days, until December 1, 2003, and then she elected to go to the Border Patrol to report Mr. Gallardo as an illegal alien.[10] (Castro Dep. 35:9-23;

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[10] The Court notes that Child Protective Services also told Ms. Castro that she could come fill out an application that would allow Child Protective Services to help her. (Castro Dep., 32:8-16). Ms. Castro was told that this process would take one to two days. (Castro Dep., 32:11). Ms. Castro decided not to go to Child Protective Services to fill out the application, because she did not want to wait 'the one to two days, she said "I wanted my daughter already." (Castro Dep., 32:17-23). However, for an unknown reason, Ms. Castro waited two days regardless, and then she chose to go to the Border Patrol to report Mr. Gallardo.

Castro Decl., p. 3; Rodriguez Dep., 10:4-16; Sanchez Decl., p. 1; Sanchez Dep., 114:2-117:14). Ms. Castro spoke with Border Patrol Agent Sanchez, who also told Ms. Castro that she needed to obtain a temporary custody order of R.M.G. (Sanchez Dep., 115:24-116:6). Agent Sanchez also asked Ms. Castro to be present when Border Patrol arrived to arrest Mr. Gallardo and his relatives. (Sanchez Decl., p. 3; Sanchez Mem., p. 2; Kurupas Decl., p. 2; Sanchez Dep., 130:13-25; 142:9-13; 151:16-24). As noted above, the purpose of having Ms. Castro present was so Border Patrol could do a citizenship check at the time they apprehended Mr. Gallardo and his relatives, and Border Patrol could then leave R.M.G. with Ms. Castro because they were both United States citizens. (*Id.*). This would have prevented R.M.G. from going to the Border Patrol station with Mr. Gallardo. (*Id.*). However, Ms. Castro chose not to be present at the arrest of Mr. Gallardo and his relatives, rather Ms. Castro watched the events unfold from a nearby relatives' trailer home. (Castro Dep., 41:1-23, 58:25-59:25; Castro Decl., p. 3; Sanchez Decl., pp. 3-4; Sanchez Mem., p. 2). Since Ms. Castro was not present at the arrest, R.M.G. traveled to the Border Patrol station with her father. (Kurupas Decl., p. 1; Sanchez Mem., p. 3; Gallardo Dep., 17:13-17). Moreover, even though Mr. Gallardo and R.M.G. were taken to the Border Patrol station very early in the morning, Ms. Castro waited until approximately 1:30 p.m. to meet with attorney Lina Trevino to begin the process of obtaining a custody order. (Trevino Dep., 9:18-22). Ms. Trevino never actually filed a state court

suit regarding R.M.G., rather Ms. Trevino went to the courthouse to try to obtain a Judge's signature, with the intention of filing the required papers after the signature was obtained. (Trevino Dep., 18:14-25). When Ms. Trevino was not able to obtain a Judge's signature on the temporary custody order before the repatriation transport left for Mexico, Ms. Trevino did not further pursue a custody order on Ms. Castro's behalf. (Trevino Dep., 23:10-24:22).

The end result of all of these actions is that Ms. Castro had no custody order granting her even temporary custody of R.M.G., even though she had had several days to obtain such an order. A court case regarding R.M.G. had not even been filed at the time R.M.G. accompanied her father into Mexico. Given these circumstances, the Border Patrol Agents were faced with an untenable decision: either forcibly remove R.M.G. from Mr. Gallardo even though there was no custody order directing them to do so, or let Mr. Gallardo continue with his possession of R.M.G., even though Mr. Gallardo was being repatriated to Mexico.

b. Border Patrol Agents' Actions Were Not Directed by Statute, Policy or Regulation

As a result of the circumstances described above, the Border Patrol was left without a "good" option with a wholly positive outcome. However, there was no statute, regulation or policy that directed the Border Patrol Agents to take a certain course of action in this unique situation.[11] (DX-F, Smietana Decl., ¶¶ 3-4).

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[11] The Court notes that Defendant has submitted evidence that:

In this case, there was no custody order in favor of Ms. Castro, no court case had been filed, R.M.G. was with her father Mr. Gallardo, and Mr. Gallardo was, not willing to relinquish possession of his child. Given the circumstances, Border Patrol Agents made the decision not to forcibly remove the child from Mr. Gallardo, and they let R.M.G. go with Mr. Gallardo to Mexico. There was no statute, regulation or policy mandating that Border Patrol should have taken another course of action, *i.e.*, removing R.M.G. from Mr. Gallardo and giving her to Ms. Castro, or removing R.M.G. from Mr. Gallardo and attempting to place her in protective custody. (*Id.*). The Court does not today condone the Border Patrol's actions or the choices it made on that day. However, [] there is no statute, regulation or policy that would have mandated that the Border Patrol take another course of action on December 3, 2003. (*Id.*).[12]

> [T]here are no policies, rules or statutes governing the apprehension and detention of a foreign national in lawful custody of his or her U.S. juvenile child . . . There are no mandatory federal statutes, regulations or policies prescribing the actions of a Border Patrol Agent when he or she encounters a foreign national with lawful custody of his or her minor, U.S. citizen child with respect to the minor child.

(Smietana Decl., ¶ 3). Plaintiffs agree with this statement in their Response to Defendant's motion. (Response, p. 9, stating that "[b]y Defendant's own admission" there are no policies, rules or statutes that apply in the above-described situation).

[12] Further, the Court notes that contrary to Plaintiffs' argument in their response, R.M.G. was not technically "deported" by the Border Patrol. (Response, pp. 9-10). When R.M.G. went to Mexico with her father, she was legally free to

c. Border Patrol Did Not Make a "Custody Determination" as to R.M.G.

Plaintiffs' main argument is that in letting R.M.G. go with her father to Mexico, the Border Patrol Agents made an "impermissible custody determination" in favor of Mr. Gallardo. (Response, p. 15). Plaintiffs' argument is unpersuasive, because the same holds true for the reverse: accepting Plaintiffs' argument as true, if the Border Patrol had forcibly removed R.M.G. from Mr. Gallardo so as to place her with her mother, the Border Patrol Agents would also be making an "impermissible custody determination" in favor of Ms. Castro.[13] The Border Patrol Agents did not actually make any "custody determination" on December 3, 2003. The Border Patrol issued no custody order and made no determination that R.M.G. should remain permanently with either her mother or her father.[14]

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return to the United States, unlike someone who has been legally deported from this country. In fact, R.M.G. did return to the United States on December 1, 2006, to live with Ms. Castro.

[13] The Court notes that Plaintiffs state in their response that "Absent court orders to the contrary, parents have equal rights regarding their children." (Response, p. 16) (emphasis in original). In this case, as of December 3, 2003, there was no court order granting either Mr. Gallardo or Ms. Castro custody of R.M.G. Accordingly, both parents had equal rights to the child. Plaintiffs argue that Border Patrol made a custody determination for Mr. Gallardo by leaving R.M.G. with her father, but Plaintiffs do not state how the situation would be any different if Border Patrol had forcibly removed R.M.G. from Mr. Gallardo and placed her with Ms. Castro – since, as Plaintiffs admit, Mr. Gallardo and Ms. Castro had "equal rights" to R.M.G. (Response, p. 14).

[14] The Court notes that if Texas is a child's "home state," it is the Texas state courts that have jurisdiction to make an initial

Rather, regardless of whether R.M.G. went with Mr. Gallardo to Mexico or whether she remained with Ms. Castro in Texas, the other parent still had legal parental rights ***and was free to seek a court custody order at a later date.*** In fact, that is exactly what Ms. Castro did, and R.M.G. returned to live with Ms. Castro on December 1, 2006. (Response, p. 7).

d. Border Patrol's Decision Satisfies the First Prong of the *Gaubert* Test

Based on the above, the Border Patrol Agents' decision to allow R.M.G. to remain with her father when he was repatriated to Mexico satisfies the first prong of the Gaubert test. See *Gaubert*, 499 U.S. at 322. The Border Patrol had given Ms. Castro an opportunity to be present at the time of the arrest, and Agent Sanchez told Ms. Castro that if she were present, R.M.G. would have remained with Ms. Castro rather than being transported to the Border Patrol station. It was Ms. Castro's decision not to be present at the time of the arrest, and it was Ms. Castro's decision not to seek a custody order of her daughter prior to an hour and a half before Mr. Gallardo was scheduled to be repatriated to Mexico. Without a

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child custody determination. Tex. Fam. Code 152.201; *see also Powell v. Stover*, 165 S.W.3d 322, 325, 48 Tex. Sup. Ct. J. 780 (Tex. 2005); *In re S.R.T.*, 2006 Tex. App. LEXIS 1395, 2006 WL 397946, *1 (Tex. App–San Antonio 2006). A child's "home state" is defined as "the state in which a child lived with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." Tex. Fam. Code § 152.102(7). Texas was R.M.G.'s home state as of the date of the events in question in this case. (Castro Dep., 20:2-21; Cendy Castro Dep., 16:23-17:1).

custody order and with R.M.G. in her father's possession at the Border Patrol Station, the Border Patrol Agents were left to make a difficult decision, one that was a product of a judgment or choice, and one that was not regulated by any statute, policy or regulation mandating a specific course of action.

4. The Border Patrol's Actions Also Satisfy the Second Prong of the *Gaubert* Test

The second prong of the Gaubert test asks whether the challenged "judgment or decision must be grounded on considerations of social, economic, or political public policy." *Theriot*, 245 F.3d at 397 (internal citations omitted). "[T]he pertinent inquiry on the 'policy analysis' prong of the [Gaubert] discretionary function exception inquiry is not whether the discretionary act at issue involved actual policy analysis but whether the act was '***susceptible to policy analysis.***" *Bragg v. United States*, 55 F. Supp.2d 575, 584 (S.D. Miss. 1999) (internal citations omitted) (emphasis added); *Baldassaro v. United States*, 64 F.3d 206, 211 (5th Cir. 1995) (internal citations omitted) ("the appropriate inquiry is whether the act in question is susceptible to policy analysis."); *Andrade v. Chojnacki*, 338 F.3d 448, 457 (5th Cir. 2003) (internal citations omitted) ("the applicability of the discretionary function exception does not turn on evidence of the actual decisions made by the defendants, but, rather, on whether the decision is or is not susceptible to policy analysis"); *Lakomy v. United States*, 70 Fed. Appx. 199, 204 (5th Cir. 2003) (internal citations omitted) ("Second, we examine whether the judgment or decision is grounded on considerations of social, economic, or political public

policy. The exception applies to any judgment or choice that is susceptible to policy analysis.").

In this case, the Border Patrol Agents' decision to allow R.M.G. to accompany Mr. Gallardo to Mexico is a decision that is "susceptible to policy analysis." *Id.* As noted above, on December 3, 2003, there was no custody order granting either Ms. Castro or Mr. Gallardo custody of R.M.G, and the Border Patrol Agents were not mandated to act in a certain way pursuant to a statute, regulation or policy. (Smietana Decl., ¶¶ 3-4). Rather, the Border Patrol Agents had to make a policy decision as to what to do with R.M.G. The options included (1) forcibly removing R.M.G. from Mr. Gallardo and placing her with Ms. Castro; (2) expending further resources in detaining Mr. Gallardo in Lubbock while Ms. Castro belatedly sought a court custody order; or (3) allowing R.M.G. to accompany her father to Mexico. The Border Patrol Agents chose the third option. The Court today does not hold that this was the optimal course of action. However, the Border Patrol Agents' decision was unequivocally subject to policy analysis, as it involved the use of government resources and necessarily involved a decision as to what the Border Patrol should do with a United States citizen child in the unique circumstances presented by such a case. *See, e.g.*, *Cazales v. Lecon*, Inc., 994 F. Supp. 765, 767 (S.D. Tex. 1997) ("Policy analysis may include the weighing of competing interests or the examination of economic constraints in light of the needs of the public."); *Baum v. United States*, 986 F.2d 716, 724 (4th Cir. 1993) (a decision as to the best allocation or use of resources is "inherently bound up in considerations of economic and political policy, and

accordingly is precisely the type of governmental decision that Congress intended to insulate from judicial second-guessing"). Accordingly, the Court finds that the Border Patrol Agents' decision does meet the second prong of the Gaubert test. See *Baldassaro*, 64 F.3d at 211.

For the reasons set forth above, the Court determines that the Border Patrol Agents' actions satisfy both prongs of the Gaubert test, and the discretionary function exception applies to bar Plaintiffs' tort claims against the United States. See *Gaubert*, 499 U.S. at 322. Accordingly, Defendant's motion to dismiss is hereby GRANTED, and Plaintiffs' tort claims against the United States are DISMISSED for lack of subject-matter jurisdiction.

C. Plaintiffs' Constitutional Claims are Moot

In their Amended Complaint, Plaintiffs assert claims for violation of the Fourth and Fifth Amendments to the United States Constitution. (Amended Complaint, ¶¶ 28-43, First, Second and Third Causes of Action). This Court has already ruled that Plaintiffs cannot seek monetary damages for their constitutional claims, as such claims for monetary relief "are barred by the doctrine of sovereign immunity." (D.E. 26, p. 2). Accordingly, for all of Plaintiffs' constitutional claims in their Amended Complaint, Plaintiffs only seek injunctive relief. (*Id.*; Amended Complaint, ¶¶ 28-43). Specifically, Plaintiffs seek injunctive relief "***in the form of assistance from Defendant United States in locating and returning R.M.G. to the physical custody of Plaintiff Castro.***" (*Id.* at ¶¶ 33, 38, 43) (emphasis added).

As noted above, Ms. Castro's daughter R.M.G. was returned to Ms. Castro's custody on December 1, 2006. (Response, p. 7). Accordingly, Plaintiffs' constitutional claims seeking injunctive relief in the form of assistance in locating and returning R.M.G. to Ms. Castro are now MOOT. The Court therefore DISMISSES Plaintiffs' first, second and third causes of action in their Amended Complaint, for violations of the Fourth and Fifth Amendments to the United States Constitution, as MOOT.

D. Plaintiffs' Claim for Injunctive Relief for Violation of 8 U.S.C. § 1101, *et. seq.*, is Moot

In their Amended Complaint, Plaintiffs also allege a claim against the United States for a statutory violation of 8 U.S.C. § 1101, *et. seq.* (Immigration and Nationality Act). Plaintiffs claim that the United States acted in violation of the statute "by detaining and removing a U.S. citizen." (Amended Complaint, ¶ 47, Fourth Cause of Action).

Plaintiffs seek both declaratory and injunctive relief in redress for this claim. Specifically, Plaintiffs seek declaratory relief "in the form of determination of the validity of any statute, regulation, policy or other procedure relied on to detain and deport Plaintiff R.M.G." (Amended Complaint, ¶ 49). Plaintiffs also seek injunctive relief, "in the form of assistance from Defendant United States in locating and returning R.M.G. to the physical custody of Plaintiff Castro". (*Id.*). As R.M.G. was returned to Ms. Castro's physical custody as of December 1, 2006, Plaintiffs' request for

injunctive relief is hereby MOOT and is DISMISSED.[15] However, since the Defendant did not raise Plaintiffs' claim for declaratory relief in their motion to dismiss/motion for summary judgment, that claim currently remains pending.

V. Conclusion

For the reasons set forth above, the Court hereby GRANTS Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (1), and Plaintiffs' claims for negligence, intentional infliction of emotional distress, false imprisonment, abuse of process and assault (under the Federal Tort Claims Act) are all hereby DISMISSED for lack of subject-matter jurisdiction. The Court finds that Plaintiffs' constitutional claims for violations of the Fourth and Fifth Amendments to the United States Constitution, as well as Plaintiffs' claim for injunctive relief under 8 U.S.C. § 1101, et. seq., are MOOT, and those claims are therefore DISMISSED. As it was not addressed in Defendants' motion, Plaintiffs' claim for declaratory relief under 8 U.S.C. § 1101, *et. seq.* currently remains pending.

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[15] As noted above, Defendant does not reference Plaintiffs' claim under 8 U.S.C. 1101 in their motion. However, the Court may still *sua sponte* dismiss Plaintiffs' claim for injunctive relief under the statute as moot. *See Berry v. Pierce*, 98 F.R.D. 237 (E.D. Tex. 1983) ("since mootness is a question concerning the fundamental powers of a federal court under Article III, had the Court considered the case moot . . . it would have been obliged to dismiss the case sua sponte.").

SIGNED and ENTERED on this 9th day of February, 2007.

Janis Graham Jack
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

MONICA CASTRO, *For Herself And as Next Friend of* R.M.G., a minor child,	)	United States District Court Southern District of Texas **FILED** **MAY 19 2006** Michael M. Millby, Clerk
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	C.A. No. 2:06-CV-00061
Defendants.	)	

PLAINTIFFS' FIRST AMENDED COMPLAINT

1. Pursuant to Rule 15(a) of the Federal Rules of Civil procedure, Plaintiffs Monica Castro and R.M.G. file this First Amended Complaint.

2. This is a civil action for monetary damages and injunctive and declaratory relief brought under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.,* 8 U.S.C. § 1101 *et seq.,* the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.,* and the Fourth and Fifth Amendments to the Constitution of the United States. Plaintiff Monica Castro, for herself and as Next Friend of R.M.G., seeks injunctive relief under the U.S. Constitution in the form of assistance from Defendant

United States in locating and returning Plaintiff R.M.G., who was wrongfully deported, to the physical custody of Plaintiff Castro; declaratory relief; and damages arising from acts or omissions of the United States of America.

Jurisdiction and Venue

3. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 (federal question), the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*, and the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*

4. Venue is proper in the United States District Court for the Southern District of Texas because Plaintiff resides in this judicial district and no real property is involved in the action. 28 U.S.C. § 1402(b).

Exhaustion of Administrative Remedies

5. Plaintiffs presented timely administrative claims with the Department of Homeland Security ("DHS"), Customs and Border Protection ("CBP"), pursuant to 28 U.S.C. § 2675(a). Plaintiffs' administrative claims were received by the United States on June 1, 2005.

6. The United States has neither approved nor denied the claims, and more than six months has elapsed since the United States' receipt of the claims. Plaintiffs' suit is timely filed pursuant to 28 U.S.C. § 2675(a).

Parties

7. Plaintiff Monica Castro is a U.S. citizen currently residing in Corpus Christi, Nueces County,

Texas. At the time of the incidents giving rise to this suit, she was a resident of Shallowater, Lubbock County, Texas.

8. Plaintiff Castro appears in this lawsuit as both a plaintiff in her individual capacity and as Next Friend for her daughter, R.M.G., a minor child. At the time of the incidents giving rise to this suit, Plaintiff R.M.G. was a resident of Shallowater, Lubbock County, Texas. Her current residence is unknown.

9. Plaintiff Castro has the authority to act as Next Friend for Plaintiff R.M.G. pursuant to Rule 17(c) of the Federal Rules of Civil Procedure.

10. Defendant United States of America is a sovereign nation and exists under the Constitution of the United States of America and the laws enacted by the United States Congress. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) are, and at all times relevant to this lawsuit were, agencies of the Department of Homeland Security, organized and existing under the laws of the United States.

Statement of Facts

11. Plaintiff R.M.G. is a three-year-old U.S. citizen. She is the daughter of Plaintiff Monica Castro, a U.S. citizen, and of Omar Gallardo, a citizen of Mexico. R.M.G. was born in Lubbock County, Texas on December 4, 2002, and was days short of her first birthday at the time the events giving rise to this action occurred.

12. On December 1, 2003, Plaintiff Monica Castro went in person to the U.S. Border Patrol station in

Lubbock, Texas and informed U.S. Border Patrol Officer Manuel Sanchez that her common-law husband, Omar Gallardo, had taken their child, R.M.G.

13. Plaintiff Castro informed Officer Sanchez that Omar Gallardo was present in the United States illegally and asked if U.S. Customs and Border Inspection would deliver R.M.G., a U.S. citizen, to her if Omar Gallardo were apprehended.

14. At that time, Officer Sanchez presented Plaintiff Castro with copies of documents bearing Omar Gallardo's photograph that indicated he was wanted in connection with a homicide in Amarillo, Texas. Officer Sanchez asked Plaintiff Castro if she had any information regarding Mr. Gallardo's involvement in said homicide. Plaintiff Castro responded that she did not know Mr. Gallardo when he lived in Amarillo, had no knowledge or information about the homicide, and was there only to seek assistance in recovering her child.

15. Officer Sanchez informed Plaintiff Castro that Mr. Gallardo would have the right to take the child to the Border Patrol station with him if he were apprehended, but that Officer Sanchez would not allow Mr. Gallardo to take the child to Mexico if he were deported because Officer Sanchez knew of the child's U.S. citizenship status.

16. Relying on the representations made by Officer Sanchez, Plaintiff Castro informed Officer Sanchez where DHS could locate Mr. Gallardo.

17. Plaintiff Castro contacted Officer Sanchez the following day, December 2, 2003, to enquire as to

whether Mr. Gallardo had been detained and whether the United States had possession of her daughter. Officer Sanchez informed Plaintiff Castro that DHS would not detain Mr. Gallardo that day.

18. At approximately 7:30 a.m. on the morning of December 3, 2003, Plaintiff Castro observed DHS agents apprehending several people at her former residence, including Mr. Gallardo and Plaintiff R.M.G. When, later that same morning, Plaintiff Castro contacted Officer Sanchez to tell him she was coming to the Lubbock station to pick up her infant daughter, Officer Sanchez replied that he would not release the child and that Plaintiff R.M.G. would be deported to Mexico with her father.

19. Plaintiff Castro, along with her mother, Cendy Castro, then went in person to the Lubbock Border Patrol station and asked to speak with Officer Sanchez.

20. Plaintiff Castro again asked to have her infant daughter delivered to her, but was told repeatedly by Officer Sanchez that he would not deliver her child to her because Omar Gallardo said he did not want Officer Sanchez to do so.

21. During that time, two detectives, who Plaintiff Castro believes were from Amarillo, Texas, approached her. The detectives asked Plaintiff Castro questions regarding the Amarillo homicide with which Omar Gallardo was allegedly involved.

22. After informing them that she knew nothing of Mr. Gallardo's activities in Amarillo, she asked the detectives for assistance in obtaining possession of her daughter. The detectives replied that they had nothing

to do with deportation proceedings, and could not assist her.

23. Plaintiff Castro could hear her infant daughter crying and pleaded with Border Patrol officials to let her see her baby, but was not allowed to do so. Other Border Patrol officials, including Officer Sanchez's supervisor, were present but provided no assistance. Plaintiff does not have sufficient information to determine whether all DHS employees present were employees of CBP, ICE, or both.

24. Plaintiff Castro asked when her child would be deported, to which Border Patrol officials told her that Plaintiff R.M.G. would be boarded on a bus to Mexico by 3: 15 p.m. that same day.

25. Plaintiff Castro then left the Border Patrol station to work with an attorney to obtain emergency custody orders. When they arrived at the courthouse, the judge was not there. Her attorney called the Border Patrol station to enquire as to the status of the U.S. citizen child, and was informed that she had already been deported, less than 12 hours after being taken into custody by the Border Patrol.

26. Plaintiff Castro has not seen or heard of her infant daughter since December 3, 2003. The only information she has as to her daughter's whereabouts is that Plaintiff R.M.G. was deported to Ciudad Juarez, Chihuahua, Mexico.

27. On May 12, 2005, the 28th District Court of Nueces County, Texas, issued a Final Decree of Divorce in the *Matter of the Marriage of Monica Castro v. Omar Gallardo.* Pursuant to that decree, Plaintiff Castro is named Sole Managing Conservator

of the child, R.M.G., and Omar Gallardo has no right of access or possession to the child.

First Cause of Action:

Violation of the Fourth Amendment

28. Plaintiffs repeat and re-allege each allegation contained in paragraphs 1 through 27 of this complaint.

29. The Fourth Amendment protects against unreasonable search and seizure. Defendant United States' detention of Plaintiff R.M.G. without due process violated her Fourth Amendment constitutional interest in remaining free from bodily seizure.

30. Detention of Plaintiff R.M.G. was not due to an act of wrongdoing that warranted detention, nor was detention based on an emergency. The United States did not and cannot show that seizure of the minor child was necessary to protect Plaintiff R.M.G.'s health, safety and welfare; indeed Defendant United States placed R.M.G. in imminent danger by deporting her with a man it knew was wanted in connection with a homicide.

31. Defendant United States intentionally, maliciously, and recklessly violated R.M.G.'s right to be free from unreasonable seizure guaranteed by the Fourth Amendment of the U.S. Constitution.

32. Defendant United States has waived immunity to suit for injunctive relief under the U.S. Constitution. 5 U.S.C. § 702.

33. The actions or omissions of Defendant United States caused Plaintiffs to suffer ongoing harm for

which Plaintiffs seek injunctive relief, in the form of assistance from Defendant United States in locating and returning R.M.G. to the physical custody of Plaintiff Castro.

Second Cause of Action:

Violation of Fifth Amendment Procedural Due Process

34. Plaintiffs repeat and re-allege each allegation contained in paragraphs 1 through 27 of this complaint.

35. The Fifth Amendment to the U.S. Constitution protects citizens from deprivation of life, liberty or property without due process of law.

36. On December 3, 2003, Plaintiff Castro made a claim of citizenship to Defendant United States on behalf of her minor child, Plaintiff R.M.G. Despite that claim, and despite Defendant's recognition of Plaintiff R.M.G.'s status as a U.S. citizen, Defendant United States intentionally, maliciously, and recklessly violated Plaintiffs' right to procedural due process guaranteed by the Fifth Amendment.

37. Defendant United States has waived immunity to suit for injunctive relief under the U.S. Constitution. 5 U.S.C. § 702.

38. The actions or omissions of Defendant United States caused Plaintiffs to suffer ongoing harm for which Plaintiffs seek injunctive relief in the form of assistance from Defendant United States in locating and returning Plaintiff R.M.G. to the physical custody of Plaintiff Castro.

Third Cause of Action:

Violation of Fifth Amendment Substantive Due Process

39. Plaintiffs repeat and re-allege each allegation contained in paragraphs 1 through 27 of this complaint.

40. The Fifth Amendment to the U.S. Constitution protects citizens from deprivation of life, liberty or property without due process of law.

41. By wrongfully and unlawfully deporting Plaintiff R.M.G., Defendant United States intentionally, maliciously, and recklessly violated Plaintiffs' fundamental substantive due process right to family integrity and protection against unreasonable government intrusion into family relationships.

42. Defendant United States has waived immunity to suit for injunctive relief under the U.S. Constitution. 5 U.S.C. § 702.

43. The actions or omissions of Defendant United States caused Plaintiffs to suffer ongoing harm for which Plaintiffs seek injunctive relief, in the form of assistance from Defendant United States in locating and returning R.M.G. to the physical custody of Plaintiff Castro.

Fourth Cause of Action:

Statutory Violation of 8 U.S.C. § 1101, *et seq.*

44. Plaintiffs repeat and re-allege each allegation contained in paragraphs 1 through 27 of this complaint.

45. Title 8 of the U.S. Code sets forth the laws governing immigration and nationality.

46. No section of Title 8 provides authority for the United States to detain or remove a U.S. citizen.

47. By detaining and removing a U.S. citizen, Defendant United States acted in clear violation of well-settled statutory law.

48. Defendant United States has waived immunity to suit for declaratory relief for statutory violations. 5 U.S.C. § 702.

49. The actions or omissions of Defendant United States caused Plaintiffs to suffer ongoing harm for which Plaintiffs seek injunctive relief, in the form of assistance from Defendant United States in locating and returning R.M.G. to the physical custody of Plaintiff Castro, and declaratory relief, in the form of determination of the validity of any statute, regulation, policy or other procedure relied on to detain and deport Plaintiff R.M.G.

Fifth Cause of Action:

Federal Tort Claims Act –Negligence

54. Plaintiffs repeat and re-allege each allegation contained in paragraphs 1 through 27 of this complaint.[1]

55. At all times relevant to this action, inspectors or other personnel were acting in their official capacity under the authority of DHS, CBP or ICE, and therefore, under the authority of Defendant United States.

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[1] [The gap in numbering appears in the original document.]

56. Defendant United States owed a duty of care to Plaintiffs Castro and R.M.G., breached that duty, and Defendant United States' breach caused damage to Plaintiffs in that:

57. Defendants' wrongful acts, neglect, carelessness, unskillfulness, or default directly and proximately caused the wrongful deportation of a U.S. citizen minor child, which has separated mother and child since December 3, 2003.

58. Said actions and inactions of Defendant United States amount to grossly negligent conduct.

59. Defendant United States is not entitled to any defense, statutory or otherwise, in that the acts or omissions of Defendant United States were not discretionary functions and were not performed in good faith.

60. As a direct, probable, foreseeable, and proximate result of Defendant United States' negligent and unlawful conduct, Plaintiffs Monica Castro and R.M.G. suffered mental anguish and suffering, loss of companionship, and R.M.G. has suffered unknown physical and psychological harm, for which Plaintiffs seek monetary relief pursuant to the Federal Tort Claims Act. 28 U.S. § 2671 *et seq.*

Sixth Cause of Action:

Federal Tort Claims Act – Intentional Infliction of Emotional Distress

61. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 24 of this complaint.

62. At all times relevant to this action, inspectors or other personnel were acting in their official capacity under the authority of DHS, CBP or ICE, and therefore, under the authority of Defendant United States of America.

63. The United States engaged in a pattern of extreme and outrageous conduct that caused Plaintiffs Castro and R.M.G. to suffer severe emotional distress, for which Plaintiffs seek relief from Defendant United States of America.

64. Officer Manuel Sanchez misled Plaintiff Castro regarding the return of her child, Plaintiff R.M.G., for the sole purpose of obtaining information regarding the location of an undocumented person present in the United States. Following Officer Sanchez's deception, Officer Sanchez and other officials of U.S. Customs and Border Protection engaged in additional outrageous conduct, including denying Plaintiff Castro the ability to see her infant child, even though the child could be heard crying, and deporting a U.S. citizen child less than 12 hours after taking her into custody, effectively foreclosing any ability for Plaintiff Castro to assert her rights as a parent of the minor child.

65. Defendant United States is not entitled to any defense, statutory or otherwise, in that the acts or omissions of Defendant United States were not discretionary functions and were not performed in good faith.

66. Defendant United States' extreme and outrageous conduct caused Plaintiffs Castro and R.M.G. to suffer mental and emotional anguish and

suffering, for which Plaintiffs seek monetary relief [ ] pursuant to the Federal Tort Claims Act. 28 U.S.C. § 2671 *et seq.*

Seventh Cause of Action:

Federal Tort Claims Act – False Imprisonment

67. Plaintiffs repeat and reallege each allegation contained in paragraphs I through 27 of this complaint.

68. At all times relevant to this action, inspectors or other personnel were acting in their official capacity under the authority of DHS, CBP or ICE and, therefore, under the authority of Defendant United States of America.

69. Defendant United States willfully detained R.M.G. without her consent or the consent of her U.S. citizen parent, and the detention was without legal authority or justification.

70. From the moment Defendant United States knew or should have known that R.M.G. was a U.S. citizen and that a U.S. citizen parent was present to take possession of her and did not release her, Defendant United States had no legal authority or justification to continue its detention of the child.

71. Defendant United States is not entitled to any defense, statutory or otherwise, in that the acts or omissions of Defendant United States were not discretionary functions and were not performed in good faith.

72. The United States' false imprisonment of the child caused Plaintiffs to suffer mental anguish and

suffering, loss of companionship, and Plaintiff R.M.G. to suffer unknown physical and psychological harm, for which Plaintiffs seek monetary relief pursuant to the Federal Tort Claims Act. 28 U.S.C. § 2671 *et seq.*

Eighth Cause of Action:[2]

Federal Tort Claims Act – Abuse of Process

67. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 27 of this complaint.

68. At all times relevant to this action, inspectors or other personnel were acting in their official capacity under the authority of DHS, CBP or ICE and, therefore, under the authority of the Defendant United States of America.

69. By wrongfully detaining and deporting Plaintiff R.M.G., Defendant United States made an illegal, improper or perverted use of the deportation process established under federal law.

70. Defendant had an ulterior motive or purpose in exercising such illegal, improper or perverted use of process and used the process to accomplish and end beyond the purview of the purpose.

71. Defendant United States is not entitled to any defense, statutory or otherwise, in that the acts or omissions of Defendant United States were not discretionary functions and were not performed in good faith.

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2 [The redundancy in paragraph numbering occurs in the original document; hence the Seventh and Eighth Cause of Action sections are each assigned ¶¶ 67 through 72.]

72. Defendant United States' abuse of process regarding the detention and deportation of the child caused Plaintiffs to suffer mental anguish and suffering, loss of companionship, and Plaintiff R.M.G. to suffer unknown physical and psychological harm, for which Plaintiffs seek monetary relief pursuant to the Federal Tort Claims Act. 28 U.S.C. § 2671 *et seq.*

Ninth Cause of Action:

Federal Tort Claims Act – Assault

73. Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 27 of this complaint.

74. At all times relevant to this action, inspectors or other personnel were acting in their official capacity under the authority of DHS, CBP or ICE and, therefore, under the authority of Defendant United States of America.

75. Defendant United States' unlawful detention of Plaintiff R.M.G. placed her in fear of imminent bodily harm.

76. Defendant United States is not entitled to any defense, statutory or otherwise, in that the acts or omissions of Defendant United States were not discretionary functions and were not performed in good faith.

77. Defendant United States' abuse of process regarding the detention and deportation of the child caused Plaintiffs to suffer mental anguish and suffering, loss of companionship, and Plaintiff R.M.G. to suffer unknown physical and psychological harm,

for which Plaintiffs seek monetary relief pursuant to the Federal Tort Claims Act. 28 U.S.C. § 2671 *et seq.*

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff Monica Castro for herself and as Next Friend of R.M.G. prays that, upon final trial, this Court provide the following relief:

a. Award Plaintiff Monica Castro monetary damages in the amount of Two Million, Five Hundred Thousand dollars ($2,500,000.00) against Defendant United States of America for claims arising under the Federal Torts Claim Act;

b. Award Plaintiff R.M.G. monetary damages in the amount of Two Million, Five Hundred Thousand dollars ($2,500,000.00) against Defendant United States of America for claims arising under the Federal Torts Claim Act;

c. As injunctive relief, order Defendant United States to immediately take all necessary measures to locate Plaintiff R.M.G. until she is found; to communicate regularly with Plaintiff Castro regarding the status of Defendants' efforts to locate and return Plaintiff R.M.G. to her; to return Plaintiff R.M.G. to her mother, Plaintiff Monica Castro; and, to assume all costs related to locating and delivering Plaintiff R.M.G. to Plaintiff Castro;

d. As declaratory relief, declare invalid an statute, regulation, policy or other procedure

relied on by Defendant United States to detain and deport Plaintiff R.M.G.;

e. Award Plaintiffs' post-judgment interest, as permitted by law;

f. Award Plaintiffs costs of court, as permitted by law; and

g. Award Plaintiffs any other relief this Court may deem just and proper at law or in equity.

Respectfully submitted,

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APPENDIX E

28 USCS § 1346

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $ 10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the

National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) (1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

APPENDIX F

28 U.S.C. § 2680

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law

providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.[.]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States

Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.